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Injury, Ignorance and Spite—The Dynamics of Coercive Collection

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Whenever one person does something in the expectation that another will then do something else, there arises, given the nature of people and time, a potential problem: the other person might not. Both this expectation and its defeat are life experiences which transcend any legal context. In no society, so far as I know, is it expected that all such expectations will be or even ought to be fulfilled, certainly not through the application of social force. If you love in order to be loved, for instance, you will have to bear, without even much in the way of clucking sympathy, your inevitable disappointments.

In a modern trading society like ours, however, where there are numerous credit transactions, where numberless persons do things in exchange for others' promises to do something else thereafter, there necessarily grow up mechanisms to deal coercively with failed reciprocations. It is the basic point of this essay that the present American collection mechanisms and institutions are grossly inefficient, engendering huge amounts of unnecessary grief and loss for all participants. Only after the anatomy of this malfunction is understood can one expect changes to be made in present collection practices which will eliminate some of this waste.

My plan, therefore, is very generally to describe the operation of the American collection system, indicating first how it would operate if collection transactions were cost-free. I will then consider the effects on such a system of collection costs, with special emphasis on how such transaction costs and the effects of those costs vary depending upon who is trying to collect what from whom. Thereafter, I will assay the role of information in the system, both as a weapon in a coercive collection process and as a method of avoiding it. And finally, I will consider collection as a separate and gravely flawed "market" and suggest at least the general direction of desirable change.

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I. Collection in Eden: Transaction Costs in the Cooperative Mode¹

Consider the following situation. At a particular point in time (P_0), one party (call him "C" for creditor, which he soon will be) has total wealth amounting to v , while another party (call him "D" for debtor) has zero wealth. At a later point (P_1), C transfers v to D, who promises to reconvey v or its equivalent to C at a still later point in time (P_2). The wealth positions of C and D at the relevant points in time, assuming that the value of v remains constant, may be represented as follows:²

	C	D
P_0	v	0
P_1	0	v
P_2	v	0

The simplicity of this result depends on at least one important assumption, that the transactions at times P_1 and P_2 are cost-free. But in fact no transaction is cost-free. Everything one does is attended by some transaction cost,³ even if that cost is only (and it never is only) an opportunity cost.⁴ Thus if the results of the above transactions are to be presented more accurately, the chart ought to read as follows

1. Particularly in the early portions of this paper, but to some extent throughout, I shall be using a simplified symbolic notation to stand for complex things and relationships. This is hardly creative mathematics or logic at work, but only an attempt to clarify and shorten the presentation. There is value in using such shorthand, but there is also a serious danger that the simplicity and apparent precision of the symbology will be taken to convey concepts and relationships equally simple and precise. That is definitely not the case here, as will become evident when the real-world referents of some of those symbols are provided. Frequently what is being attempted in this essay is the precise statement of very mushy things. See, e.g., pp. 7-18 *infra* on the content of "t."

2. I am here excluding at least three factors which would have to be reflected in any more realistic model. First, I am leaving out any reference to what would be expected in the real commercial world, a charge for the use of v . Second, I am not reflecting the fact that at the time P_1 , C would possess a claim, an account receivable, of v (or some discounted portion of that face value), and that D would have a corresponding account payable. Third, in using the concept v I will much of the time ignore the fact that the value of v , insofar as v stands for real goods, would tend to fluctuate over time because of market-price movements, normal functional depreciation, or in response to the increased or decreased likelihood of its recovery. When those possible fluctuations are of particular importance to the analysis I shall discuss them, but most of the time I shall stipulate v as a constant standing for a transfer and its agreed-upon reciprocation.

3. At this stage in this essay the term "transaction cost" refers to those costs and losses borne by a party in connection with effecting any exchange, including payments and repayments. Depending on how one looks at things, it can expand or contract meaning within very wide parameters. See Demsetz, *The Cost of Transacting*, 82 Q.J. OF ECON. 33, 35 (1968). I will, for the purposes of this essay, "pour into" this concept a great deal of more precise meaning as I go along. See pp. 7-18 *infra*.

4. For the time being it is assumed that each party bears his own transaction costs and cannot transfer them onto the other, or externalize them onto a third party. But see p. 10 *infra*.

(with " t_{c1} " standing for the creditor's transactions costs at point P_1 , and so on, and " t_{d1} " standing for the debtor's):

	C	D
P_0	v	0
P_1	$0 - t_{c1}$	$v - t_{d1}$
P_2	$v - (t_{c1} + t_{c2})$	$0 - (t_{d1} + t_{d2})$

All this means, however, is that if one stipulates a system within which something of the value v is to be moved to and fro, at the end of the to, and even more at the end of the fro, there will be a progressive shrinkage of the amount of v left in the system; something will be expended in the moving which redounds to the benefit of neither party.

For the economist this undeniable fact presents few theoretical difficulties. Transaction costs are to economics what friction is to classical mechanics, that which transforms pure science into engineering. For most purposes, a transaction cost is like any other cost and requires no extraordinary fuss. When an economist is speaking *qua* physicist rather than as an engineer he will, after noting the practical importance of transaction costs, exclude them from his theoretical model.⁵ Thus the "economics of transacting" has rarely been subjected to extended consideration by economists.⁶ Similarly, to the businessman transaction costs merit no special consideration.⁷ The costs of lending and collecting money, for instance, are part of the administrative cost of any credit business and are reflected as are any business costs in the price charged.⁸ This understandable lack of theoretical interest should not, however, cause anyone to overlook the fact that the source, shape, magnitude and impact of transaction costs are vitally important to understanding the transactions themselves.⁹ To the extent that transaction costs are understood by the participants, they may significantly affect

5. See, e.g., Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

6. Demsetz, *supra* note 3, at 33. In fact, Demsetz describes his paper as "a beginning," though a few other examples in the economic literature are cited at 34 nn. 1 & 2. See also G. CALABRESI, *THE COST OF ACCIDENTS* 135 ff., 150-52, 172, 181 ff., 252 (1970).

7. This may be a nice place to quote the remark of a very pure mathematician:

[I]t is obvious that irrationals are uninteresting to an engineer, since he is concerned only with approximations, and all approximations are rational.

G. HARDY, *A MATHEMATICIAN'S APOLOGY* 102 (1961).

8. Of course there are constraints upon the extent to which costs can be absorbed in a price, involving the competitive situation, the elasticity of demand and many other things.

9. See Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970):

The influence upon contract, and upon economic organization generally, of the cost of enforcing various kinds of contracts has received virtually no study by economists, despite its immense potential explanatory power.

their choice of collection strategies and the overall efficiency of the collection process.

Those transactions in which agreed and undisputed payments are made according to an agreed and undisputed schedule come very cheap. If one takes as the paradigm of efficient collection the check mailed on a fixed date to pay an obligation known by the obligor then to accrue, the total cost is the creditor's bookkeeping and the debtor's labor, check, envelope and stamp. The information component of the collection system—what to pay, when and to whom—has been supplied at the time the contract was entered into and has added almost nothing to the collection cost: the “medium” of the agreement having already been created, the cost of adding these other messages (given the width of the channel) is close to nil.¹⁰

This efficiency depends on a “frictionless” accord between the parties: they agree on the facts of past performance and present obligation. Using the term advisedly, they “cooperate.” This very arcady of the General Will is, oddly enough, widely existent. Most debts are paid and most obligations are carried out without confusion or coercion. But even in this mode, some transactions are more perfect than others, the declinations, as usual with trouble in Paradise, being associated with failures of knowledge and will. Some people forget and have to be reminded. Some do not forget and have to be reminded. Errors creep into the stating and recalling of the price, some accidental, some not. Creditors with enough transactions to make statistical treatment feasible structure their business relations so as to make provision for these variations within the cooperative mode. If volume justifies differentiation, the effort may be made to counter the “losses” of delay with differential pricing: the “2% ten-days, 30-days-net” provisions and their ilk are one such procedure, as is the common retailing device of a free period followed by a finance charge. More generally, in seeking to predict the cost of collection, the businessman averages the “cooperative” paying patterns of his clients (their rate of payment, the administrative costs of reminding and threatening them), and tucks the predicted result into his credit price pattern.¹¹ He also tucks into that pattern a summation of the effect on his profits of the occasional expulsions from Eden—what it will cost him on the average when people

10. The more installments, and thus the more transactions, the higher the aggregate cost of the whole process; measured as a percentage of a debt small in absolute terms, it may not be *de minimus* and may affect the price structure of the creditor. See Kripke, *Consumer Credit Regulation: A Credit-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 447-48 (1968).

11. But see note 8, *supra*.

Coercive Collection

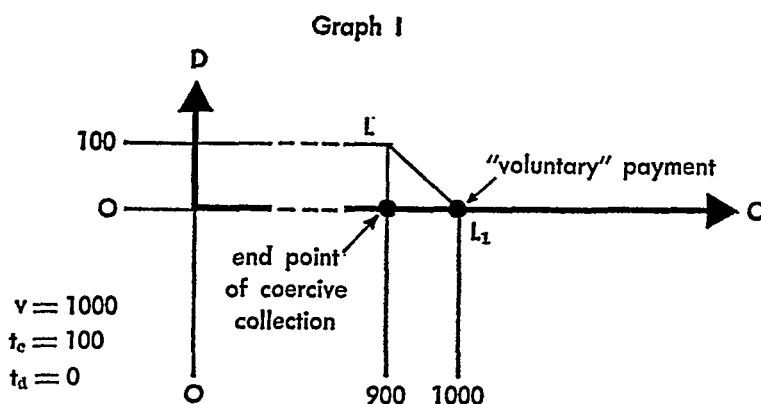
with whom he deals refuse to pay at all, or only under coercion. Individual transactions thus priced on the basis of an average of many past transactions are individually underpriced if they in fact require collection-transaction costs above the average.

If the debtor will not cooperatively carry out his obligation, the creditor must resort to coercion if he is not to be deprived totally of the v involved. Although there are several methods of coercion open to a creditor facing an obdurate debtor, the most visible is the judicial-coercive mode, going to law to enforce one's right to repayment.

II. Collection in America: Transaction Costs in a Judicial-Coercion Game

A. Introduction: *The Creditor's Dilemma*¹²

Under the American law of contracts, after the other party has fully performed his obligations it is absolutely irrational for you fully to perform yours.¹³ If you, D, refuse voluntarily to repay v in full, C would always be better off accepting from you some lesser performance, $v - x$, so long as $(v - x) > (v - t_c)$.¹⁴ Thus if v were 1000, and if D could force C in recovering v to expend a t_c of 100 while suffering no t_d himself, it would be rational for both C and D not to allow the coercive collection process to go to completion, but instead to settle on a repayment of anything between 901 and 999, that is, at any point on $L-L_1$ on the following graph:

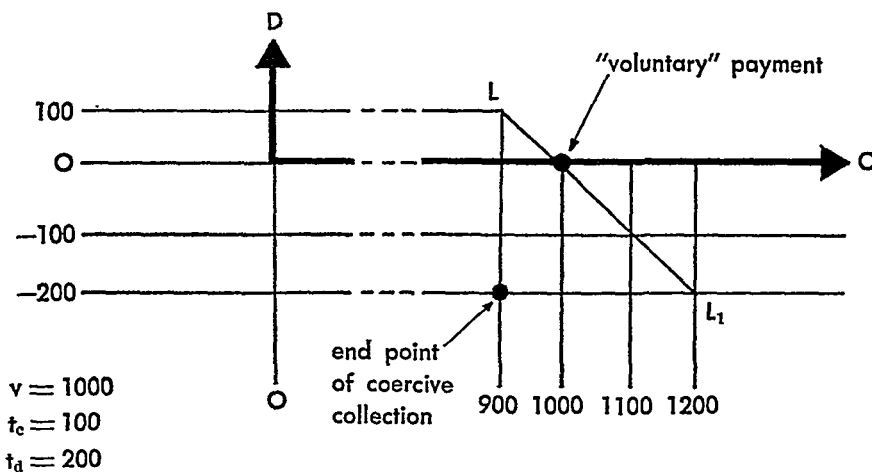


12. Especially in this portion of the essay, I shall be using some of the basic terminology of simple game theory. See A. RAPOPORT, *TWO-PERSON GAME THEORY—THE ESSENTIAL IDEAS* (1969). I claim no particular depth for my use of this terminology, treating it only as a hopefully clarifying shorthand. Others, however, have attempted to use game theory more

For what $L-L_1$ represents is the locus of all points the sum value of which is 1000, that is, all points which, while no worse than the end point of a completed coercive collection for either party, totally conserve the v for division between C and D. No wealth is "wasted" on t . If one views coercive collection as a two-person game, and one takes account of the costs of playing it, it is not a two-person zero-sum game, but a two-person minus-sum game, and the parties can both gain by avoiding the play altogether, agreeing instead on an $L-L_1$ settlement.¹⁵

When D has no t_d , he is comparatively indifferent as to whether the game is played or not; playing cannot make him worse off than not playing can. But what if D were forced to suffer, as part of the same coercive transaction which generated the t_c of 100, a t_d , perhaps one in excess of 100? That, pictorialized, might look like this:

Graph II



substantively in rather less economic contexts with interesting (though mixed) results. See, e.g., R. BRAITHWAITE, *THEORY OF GAMES AS A TOOL FOR THE MORAL PHILOSOPHER* (1955); McWilliams, *On Violence and Legitimacy*, 79 YALE L.J. 623 (1970), and especially T. SCHELLING, *THE STRATEGY OF CONFLICT* (1963).

13. This irrationality may disappear once the reputational effects of default are accounted for. See pp. 27-33 *infra*.

14. A more detailed description of the nature of t_c and t_d is developed at pp. 7-18 *infra*. At this point t_c and t_d should merely be taken as the amounts C and D will respectively be "out" in connection with a play of this kind of coercive collection game. Note, however, that by this location I have eliminated any mention of the transaction costs of voluntary repayment. This, of course, is an assumption contrary to reality, but not only does it make for a neater presentation, it does not seem to falsify the game. Whenever coercive- $t_c \leq$ cooperative- t_c , it makes just as much sense to treat the figures as, say, 100 and zero, as 120 and 20.

15. Whether it is more economical to reach agreement than to play depends, of course, on the cost of reaching agreement compared to the sum of t_c and t_d . See pp. 38-45 *infra*.

Even if the parties "agree" to avoid the end-point, there is no single point on $L-L_1$

Again, playing the coercion game to completion would be minus-sum, and again both C and D would be well advised to find some point on $L - L_1$ at which to settle. But in this case D would no longer be indifferent as to whether the game were played or not, for a completed game, while hurting C, would hurt D more. Thus the ultimate settlement point on $L - L_1$ would tend to move further southeast, that is, more to the taste of C.¹⁶ And if t_d could be made great enough relative to t_c , D might well decide to pay all of v in order to avoid the threatened playing of the game. Thus the actual posture of the parties will depend largely on the relative quantities of t_c and t_d which, in any particular context, coercive collection will predictably generate.

B. *The Content of t_c*

A claim for or with respect to something of value against a party in possession of it can arise only in a society which recognizes the critical distinction between possession and right to possession. Ours does. In fact, most claims about goods in our society are variations on the simple declarative statement "You have something which belongs to me," ordinarily fleshed out with some chronicle of how such an odd state of affairs came about.¹⁷ It is not so much that possession is nine

which is *the* rational solution. There are aesthetic solutions. The midpoint of $L - L_1$ (950/50), for instance, apportions equally the amount gained through cooperation. Point 999/1 bribes D with one unit above what he would end up with if he remained recalcitrant. 901/99 makes C "pay" all but one unit of his t_c , but still makes it one unit cheaper for him to settle than to play. These are all reasonable and attractive points to pick, but despite their natural appeal, they are no "better" than any others. See T. SCHELLING, *supra* note 12, at 278-90 for his illuminating discussion of the use of symmetry as a solution to game-theory problems otherwise indeterminate.

The point at which C and D would finally settle depends on "bargaining power." But to make any meaningful assessment of this matter one would have to know a great deal about C and D individually, *e.g.*, their level of effective nastiness, their intelligence, knowledge and pertinacity, and their relative marginal utilities for money. From another perspective "superior bargaining power" is what you award to someone as an accolade when you find out he got a better deal than you expected. It is an entry on his personal books that fills the same function as "good will" does on the books of a company with a lousy product and a superior earning record.

16. It cannot, however, at least in theory, move southeast of the voluntary payment point. Any doubt as to his obligation will entitle D to hold out for a lesser payment (see 6 A. CORBIN, *CONTRACTS* § 1287 (1962)), but C is not equally justified in refusing payment in full. That does not mean, of course, that Cs never manage to screw more than v out of D. Non-rebated "flipping" (see H. KRIPKE, *CONSUMER CREDIT* 103-12 (1970)), and claims for collection expenses never expended (see the notorious *Imperial Discount Corp. v. Aiken*, 38 Misc. 2d 187, 238 N.Y.S.2d 269 (N.Y. Civ. Ct. 1963)) spring immediately to mind as media for such extortions.

17. One might even classify common-law civil actions in terms of those explanatory narratives, *e.g.*, "Because you took it out of my possession" or "found it" (replevin, trover); "Because I let you have it for a time which has now expired" (detinue); "Because I gave it to you in exchange for something else to which I am now entitled" (debt, general assumpsit); "Because you took something from me which in the nature of things you can't give back except in rough equivalence" (trespass, or case for negligence).

points of the law, but that the legal problem is usually with the remaining point.

It is relatively rare in our society for one to be able to transfer things of value from another's possession to one's own solely by the use of one's own labor, without the other's cooperation, or exceedingly ostentatious assent.¹⁸ It is, in fact, at precisely the moment that one asserts in oneself a right to possession which is superior to another's actual possession that the requirement ordinarily attaches that one purchase a third-party source of information and force, the "law." But the "law," at least as embodied in legal process, is a very expensive mechanism for generating and channeling information and force.

One must to some extent be Hobbesian about it. If paid for and played from beginning to end, this expensive game does result in the acquisition of an immense bundle of power; behind every final judgment procured in any court in this country stands, ultimately, the United States Army, but even the intermediate mercenaries one buys—sheriffs, marshalls, judges—are usually sufficient unto the day. If someone has something that "belongs to" you and "the law" finally says so, so far as power can get it to you, that power will suffice. But the price one is supposed to pay for harnessing the Leviathan to one's cause is, essentially, the cost of moving it according to its own rather arcane principles, that is, the cost of due process.

The cost of due process is high for at least four reasons. First, due process demands that at the outset the court and its officers be wholly ignorant of what happened and it is expensive to educate them, at least using the pleading-and-playlet format of the common law. Second, the process of education cannot proceed on a generalized (mass-produced) basis; each case is theoretically hand-crafted. Third, save in a court of small claims it is usually specialists (e.g., lawyers) who do the crafting. Fourth, because the courts do not allocate docket space by competitive bidding between plaintiffs, the creditor with the largest claim at stake must take his place in a "queue" behind plaintiffs with smaller claims.

In reality, however, the practice is not quite as hard as all that. Fact finding and rule applying does tend to get stylized, and some of the specialists, through repetition, learn their jobs well. But there is another factor involved in using "the law" with respect to half-executed contracts which tends to increase the transaction costs of the party who

18. It can be done, even in a collection context, by means of self-help repossessions, for instance. *See* pp. 11-12 *infra*. Even then there are some limitations. *See* note 26, *infra*.

has performed: the risk of wrongly losing, and of losing all.¹⁹ Assume again that C has done all that he promised D while D has done none. If nothing else were to happen at that point, C would be out v and D would be ahead v , for something “belonging to” C is at that point in D’s hands. Now, assume further that D refuses to pay, and that C must go to law. Even if the law functions properly (that is, in accord with the assumed facts) the maximum that C can recover is $v - t_c$. But if the law miscarries and a “wrong” decision is made, C’s post-litigation status could be as bad as $0 - t_c$. This, of course, is C’s maximum exposure. Though the law does tend to formulate as many transactions as possible in yes-no terms,²⁰ it is not always that rigid. While C might not get v , he might still get an amount greater than zero. But there are nonetheless innumerable accidents in legal proceedings which lead to status quo results, and for C any result which retains the status quo is more than a total loss.

What makes this risk-of-status-quo factor particularly interesting is that it is proportional to the magnitude of v . It is ordinarily less irrational to spend any given quantity of t_c as the amount of v to be recovered (which would be abandoned by abjuring the expenditure) increases. But the risk component of t_c increases as the amount of v being put in jeopardy by the litigative system increases. So long as v is not thrown into the judicial-coercive system with its power to transform C’s property finally into D’s, there is always hope. As soon as the final writ is executed, however, no further bargaining about v is possible; whoever it objectively belonged to, it now belongs to whoever won. Thus the greater the value of v , the more C may be irrevocably out-of-pocket, and the more dangerous it is for him to risk the irrevocable loss.²¹

19. I am, for reasons which will shortly become obvious, somewhat nervous about including the “costs” (actually risks) I am about to describe as just another component of t . On balance, I think such an approach clarifies the analysis and treating risk as a “cost” is hardly revolutionary. But I am aware that it turns t into a rather capacious portmanteau term which demands (especially in later manipulations) careful concentration on its actual definition.

20. See *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32, 49, 59 (H. of L.) for quite recent, well-known and open talk about the common law’s problems with splitting or otherwise dividing the difference.

21. Of course, if C does nothing and D does not pay he will lose all of v anyway. The difference between other collection methods and the judicial-coercive mode is that a mistake under the latter is final. As the recalcitrance of D becomes more firm and longlasting, however, the differential risk of going to law decreases. Another way to put this is to say that if one views v as an account receivable, its actual value will decrease from face value as more and more discouraging information about this D appears, and a “final” judicial loss will be the loss of less. But the depreciation in the value of v is not a simple function of the passage of time, or even of the immovability of D in the face of other than judicial collection approaches. If one successfully sues a stubborn but solvent D, one may

As we shall see, not all kinds of Cs need bear this due-process t_c to any material extent.²² But some do, and to the extent that they do it is significant, sometimes determinative, in their collection-strategy decisions.

C. *The Content of t_d*

The judicial-coercive process is so designed that C may have to go through a number of steps, none cost free, even though D remains totally passive. Unless one counts the cost of tearing up and throwing away an occasional summons, the process can be free for D all the way from institution of the action to execution of the judgment. C's mercenaries will have little difficult or dangerous work to do if D chooses this course of inaction, and the resultant t_c will be low, but the choice is D's. In order to increase C's costs over the bare minimum for commencing a lawsuit and taking it through to judgment, D can expend some money and effort. But the critical point is that in most cases of breach, C will be forced to spend some t_c before D need even decide whether he will spend any t_d .

Were this where the story ended, the irrationality of paying one's debts would not be merely apparent. But we all know that not fully carrying out one's obligations can bring with it a retribution that is hardly limited to social disapprobation, a guilty conscience, or an unpleasant afterlife. Translated into our formal terms, there are components of t_d in addition to those which our analysis has heretofore taken into account. Most of these components do not take the form of a direct transfer payment from D to C, but a typical one does involve such a shift. Not only do the courts regularly enforce contractual clauses providing that the creditor who sues successfully also recover the expenses of collection, even in the absence of any specific provision certain costs of collection are allocated to the defaulting buyer.²³ This particular transfer payment simultaneously decreases t_c and in-

still eventually get all of v , less only the cost of getting the decree and execution. But until one knows that litigation is the only way, it is risky to try, and chance losing forever.

This risk- t_c factor is much more significant in situations where walking away would cost C not only v , but an adverse judicial decree could cost him much more than v , e.g., any test case situation where only one or a few litigants are likely to challenge C's right, but if one of them wins many other potential litigants, theretofore stymied by that "right," will also have an easy remedy. In such a case, it may be intelligent for C to avoid the risk altogether by buying off the active litigants with abandoned v 's. This may be merely a specific application of the general rule that unknown future states are more threatening to those who have a greater stake in the status quo.

22. See p. 22 *infra*.

23. See UNIFORM COMMERCIAL CODE § 9-504 (1962).

creases t_d . A complete transfer of t_c to D will not be possible because C still must bear the risk component of his t_c , that is, the same miscarriage that would bereave C of v rightfully his will deny him that portion of t_c he would have been awarded had his suit been successful. But this is only to say that these cost-shifting devices may not by themselves be sufficient to force D into a position where it would be wholly irrational to breach, where, that is, $t_c = 0$ and $t_d > 0$.

Beyond these procedures for shifting the cost of coercive collection to D,²⁴ there are for C even more powerful and threatening devices which involve no transfer payment at all. They function not as payments to C, but as mere destruction of D's wealth. But that too acts to coerce D.²⁵ In a sense, of course, all t_d is like that; it hurts D without directly helping C. But some kinds of t_d , the costs of defense, for example, can be avoided by raising none. The components of t_d to be considered next cannot be avoided merely by remaining passive. Indeed such a response is likely to increase the injury.

When D has defaulted in the performance he owes to C, there are two courses open to C under modern sales law. He may attempt via self-help to get back what he gave D,²⁶ or he may at law attempt to get what D promised to give him. In some situations he may reclaim goods delivered under a contract (so far as that is physically feasible) and then, to the extent that that does not get him to where he would have been had the transaction gone through as planned, he may attempt to get additional things of value from D to make up the deficiency.²⁷

The attractiveness of the self-help process is obvious: it sometimes permits C to recover some large portion of v without incurring the usual expenses of going to law. It is, in effect, an opportunity to use state-of-nature power to get out of the C position without having either to buy off, or buy in, the Leviathan. It is not, of course, cost free; night work with tow trucks (or even with duplicate keys) entails expense, but seldom as much as a litigated lawsuit and subsequent execution.²⁸ Moreover, it is possible in this way for C to recover all. This depends

24. These cost-shifting devices are not equally available to all types of Cs. See pp. 21-22 *infra*.

25. See p. 7 *supra*.

26. There are some limitations upon the manner and means of self-help repossession. At the very least, a good old medieval affray is most likely out, see UNIFORM COMMERCIAL CODE § 9-503 (1962), though stealth and cunning seem not only lawful, but the order of the night. See Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 28 (1969). To use an earlier idiom, it seems to be that one may properly repossess "craftily and subtly," but not *vi et armis*.

27. UNIFORM COMMERCIAL CODE § 9-504(2) (1962).

28. The process set out by law for dealing with repossessed goods may entail some extra expense. See UNIFORM COMMERCIAL CODE §§ 9-502—9-507 (1962).

on the value to C of the goods seized and the amount of the debt outstanding at the time of the repossession, but given a high enough down payment and a low enough rate of depreciation for the goods, C may be made whole solely by retaking the goods.

But there are significant additional injuries inherent in self-help or judicially-ordered repossession which do not directly inure to C's benefit but which may so increase t_d as to inhibit D's breach. First is the loss which comes solely from being deprived of a good's use. Obvious examples are the repossessed fabricating machine, the padlocked plant and (in the context of non-business "productive" assets) the automobile which is the only access to work. This harm can be visited on D even if C does not get use and/or resale rights in the item, as the garageman's and lawyer's liens amply illustrate.²⁹ Once deprivation is coupled with a power of resale, however, D's loss increases and becomes more permanent. There are numerous things in the world that are worth much more to one person than they are to any other person. Consider the situation of a man owning a drill press which he uses in his business. He bought the press ten years ago and has used it since, not without problems, but by and large successfully. It has a slight tendency to yaw to the left and thus the operator must keep up a constant countervailing pressure. When used at top speed it tends to burn out its bearings. After some bitter experience all that is now known and integrated into its use pattern. What is also known and integrated is that it has no other material peculiarities; make but these few adjustments in use and it will drill press away to one's perfect satisfaction. The price of discovery has been spent. But put such a press up for sale, even in an honest, open auction market, and the sound buyer will discount his bid by the possibility of disaster. After all, it is a "ten-year-old press" of this manufacture and that appearance. It is a mystery. It may functionally be worth as much as it is, but it may be worth almost nothing.³⁰

When there are added to this "normal" depreciation factor all the other factors which may lower the price fetched by used goods in an

29. See N.Y. JUD. L. § 475 (McKinney 1968) (attorneys); N.Y. LIEN L. § 184 (McKinney 1966) (garagemen). And even if the item is a television set, its deprivation over any period of time is still a loss, though perhaps not as easily quantifiable in money terms.

30. This might also be called the "obstructed seat factor," *i.e.*, the difference in value between an obstructed-seat ticket to one who has never before sat in that particular spot, and to one who has and knows that once the game starts a moderate (if continuous) lean to one side produces a perfect view of everything but, say, a shortstop swung way over to play a left-handed pull hitter.

aftermarket, for example, restricted buyer pools approaching mini-monopsonies, insufficient sale advertising, unenthusiastic and incompetent selling, title uncertainties, and the lack of price-maximizing incentives,³¹ the potential loss in value to an ex-possessor becomes substantial.³² With consumer goods, yet another factor enters further to drive this value-destruction vector: non-functional depreciation, the loss in value consumer goods suffer when they move from the category “new” to the category “used.” To use the classic example, the ten odometer miles between pier and Hondling Harry’s has no effect on market value; the ten miles from Harry’s to the buyer’s home costs a fortune. Part of this depreciation is an averaging out of the dangers of mystery: “if it’s so great a car, why didn’t he keep it.” The major reason for the loss in value, however, is largely inscrutable: buying a new car is different from buying a used car and market values reflect that difference.³³ In any event, for a variety of reasons, when a creditor repossesses goods and transfers their valuation base from “value to possessor” to “market value” the value of the goods involved will tend to decrease absolutely.³⁴

Mere value destruction, of course, cannot do C any direct good. If his claim is properly for more than the repossession-resale will realize, it may do him actual harm, assuming he cannot get the deficiency from D at all, or at least without suffering unreasonable additional costs. But the threat of this value destruction is a threat of serious injury,

31. Schuchman, in his exceedingly interesting article, *supra* note 26, emphasizes these structural and quasi-conspiratorial factors. I have reservations about some aspects of his conclusions, for instance his attempt to equate “Red-Book” prices (wholesale or retail) with “fair market” value. See, e.g., *Alliance Discount Corp. v. Shaw*, 195 Pa. Super. 601, 171 A.2d 548 (1961), and *Nelson v. Monarch Investment Plan of Henderson*, 7 UCC Rep. Serv. 394 (Ky. 1970), both questioning the trustworthiness of the “Red Book” as a guide to market value. But in general I find myself concurring in Schuchman’s conclusion that if the seller has an interest in only a portion of the price a thing might fetch, he has little incentive to attempt to procure more than that amount. For all the creditor cares, any amount over his claim can go to the debtor from whom he seized the goods, or to the dealer who sells on his behalf (or buys from him), or down the drain. Insofar as Schuchman implies that the financier will not even try to get as much as his outstanding balance from the repossession, however, being willing instead to rely on a deficiency-judgment collection to make up the difference, I find myself incredulous; do businessmen really not roast the bird in hand rather than outfit a hunting expedition into the bush?

32. In addition, once the debtor’s default is known, his credit-replacement cost rises because of the effects on reputation of non-payment. See pp. 27-33 *infra*.

33. Model-year depreciation of unused cars is similar. Part of the lower price reflects the lower later trade-in value of an earlier-year’s new car, but part reflects the desire to go *really* “new” if one is going to go “new” at all.

34. Of course, a sophisticated D may have refused to pay because the market price has declined since he made his deal. And even an unsophisticated D will occasionally know that the particular item is a real lemon, and not at all “integratable” at any reasonable cost. Thus in some circumstances the default-repossession-resale process may actually yield D more than keeping the goods would.

available at a cost relatively low in comparison to the magnitude of the injury inflicted.³⁵ It is an increase in the applicable t_a .

The potentiality of repossession and resale to increase strikingly the ratio of t_a to t_c by destroying value in D's hands is manifest, often to a greater degree, in the operation of the other common execution technique, garnishment. But the attractiveness of garnishment from a creditor's point of view does not lie solely in its excitingly abusive possibilities. In theory, and often in practice, garnishment would be a lovely remedy to have even if it threatened no excess injury to the debtor. The way it is supposed to work is that the faucet whence liquid cash flows periodically to your debtor is directed to divert at least a little rivulet to you, at the faucet's cost and risk, until your cup runneth over. No need to grab possession of things, store them, manipulate them, push and shove them about until they turn into usable dereified value. No need to follow-up, time after time, the vicissitudes of sheriffs and auctioneers. Just wait, and to you all things will be given, slowly perhaps, but with interest.³⁶ Indeed, from a creditor's point of view, garnishment is one of the most effective techniques for the non-cooperative collection of debts ever devised.³⁷

But at least in certain circumstances, garnishment is additionally capable of inflicting grievous injuries upon a recalcitrant debtor that are frequently far in excess of the "injury" which paying the debt might entail. For though garnishment, like any lien, will interfere with the use of any liened property (a lien on a businessman's bank account will seriously interfere with his use of those liquid assets),³⁸ the

35. This is even more striking with respect to many non-durable consumer goods like clothing, which have only ruinously trivial resale values, than it is when one pictures only automobile repossession.

36. The amount of wages which may be garnished is everywhere limited by Federal statute, see 15 U.S.C. § 1671-77 (Supp. IV 1969), and some state laws limit it even more stringently, e.g., *N.Y.C.P.L.R.* §§ 5205(e)(2), 15231 (McKinney 1963).

37. In the good old days, that is before 1969 when *Sniadach v. Family Finance Corp.* of Bay View, 395 U.S. 337 (1969) was decided, the device was even more alluring, since it was possible under the laws of many states to garnishee debts owed one's debtor prior not only to hearing and judgment, but even to notice. And this could be done even in the absence of any compelling need for such a process, like the defendant's absence from the jurisdiction. Since *Sniadach*, it is clear that garnishment of wages prior to notice and some kind of hearing violates procedural due process. What else is out is not so clear. Whether *Sniadach* covers garnishment of debts other than wages, debtors other than those who need their wages to live on, attachments other than debt attachments, "contract" rights (e.g., wage assignments) as well as "legal" rights, etc., and how much judicial involvement is enough, are currently the subject of speculation and judicial probing. See, e.g., Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflection on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158 (1970).

38. The fact that an unlifted lien is an "act of bankruptcy" is an additional pressure upon an insolvent business debtor. See Bankruptcy Act § 3a(3), 11 U.S.C. § 21 (1964).

damaging impact of garnishment will likely be greatest if the debtor is a wage earner and the assets liened are his wages.³⁹ One of the explanations for this is that a wage earner is likely to have a greater practical need for every penny of his wages than a businessman is likely to have for any particular liened asset; on the average, even with respect to equal-size garnishments there is a factor of differential marginal utility of money at work.

If, however, that were the only source of additional injury in wage garnishment it would be sufficient to do what has heretofore been done, severely limit the garnishable portion of a paycheck.⁴⁰ The primary injury factor in wage garnishment lies elsewhere, however, in the effect of that legal process upon employer-employee relations. The trouble is that garnishment imposes transaction costs upon the employer. No one doubts that the mere processing of the writ costs the employer some money; the only dispute is about the amount.⁴¹ In addition there is always the risk of error in processing the writ and responding to it. Thus the garnished employer may find himself obligated to pay the same wages twice. In fact, it is precisely the cheapness and efficiency of the process from the creditor's (and even the debtor's) point of view which makes it so annoying to the employer. The reason it is so cheap is that it is the employer who organizes it, administers it, and risks its occasional errors.

In addition to these direct costs, the employer also suffers derivative losses. Insofar as something is deducted from a worker's paycheck (and increasingly as the amount increases) the motivation of the worker to perform well also decreases. He is just not as interested in doing his job as well.⁴² That may have a nasty effect, not only on the debtor's productivity, but on the morale of the shop. Moreover, beyond these obvious economic effects lie the equally powerful psychic effects on the employer. One study indicates that many employers are outraged at the

39. See, e.g., *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337; Kerr, *Wage Garnishment Should Be Prohibited*, 2 PROSPECTUS 371, 378-81 (1969).

40. See, e.g., 15 U.S.C. § 1674 (Supp. IV 1969); *N.Y.C.P.L.R.* § 5252 (McKinney Cum. Supp. 1970-71).

41. See Note, 43 WASH. L. REV. 743, 755-56 (1968).

42. This factor would tend to bulk larger with respect to these jobs for the doing of which pay is the only possible justification. Insofar as the worker is alienated from his labor as a process with its own rewards, then as the money reward decreases so does the urge to do it, at all or as well. It may be, of course, that everyone is to some extent so alienated (*cf.* Dr. Johnson's "No man but a blockhead ever wrote except for money."), but there is a considerable body of argument that non-artisan laborers, who tend to be the wage garnishees of America, are more disaffected than most. See H. ARENDT, *THE HUMAN CONDITION* (1958), esp. chs. 3 & 4; H. MARCUSE, *EROS AND CIVILIZATION* (1966), esp. ch. 4.

debtor's apparent improvidence, and might react to it even if there were no costs involved in processing the garnishment.⁴³ The offense is moral, and as usual with morality, the employer's response may be impervious to rationality, social or economic. After all, the unfairness is so patent. Here is a transaction between C and D. Either D is improvident, or C is at fault, or both, but of the three parties involved in a garnishment proceeding, who gets the cost, the risk, and annoyance and the anxiety? The only one who had nothing to do with the whole transaction, the employer.⁴⁴

Taking all these aspects of garnishment together, it is not surprising that employers frequently seek to dissociate themselves from the whole mess. Given the legal situation which makes reaction against the creditor difficult, if indeed at all possible, the employer is likely to take some kind of action against the employee-debtor. That does not mean that the garnished employer will always fire his employee. Frequently, one might guess, he acts by threatening the employee and pressuring him to extricate both of them by paying up. This is the course the creditor would prefer, at least as an economic matter. Or one can also imagine an employer taking the employee's part, either in fighting the claim with the employee or in supplying the wherewithal to settle it. But also with some frequency,⁴⁵ the employer will fire the employee just to extricate himself from the whole garnishment *schreck*. And the same factors which militate in favor of such a decision simultaneously tend to maximize the brutal economic effect of any such discharge.

Leaving aside total irrationalities, on the no-guy-who-doesn't-pay-his-bills-can-work-for-me level, the decision whether to fire a garnished employee would seem to involve some calculation of comparative costs. If the employee is valuable and hard to replace (at least at his wages), then one would not lightly discharge him. As the labor market tightens, that is, as fewer workers are easily and cheaply available, the higher becomes the value of the one already employed. But the reverse is also true. The less specially skilled and competent the employee, the more easily he can be replaced. Thus it is more likely that the employer will discharge him rather than put up with even moderate economic and psychic costs. But it is just these marginal, easily replaceable

43. Kerr, *supra* note 39, at 394. The Kerr study must be used with some caution, however, because of acknowledged methodological problems in the research design.

44. It is also likely that typical employers have images of themselves as creditors, rather than as debtors, though they are, of course, almost invariably both.

45. The rate is variable, apparently depending, among other things, on the size and bureaucratization of the employer. See Note, 43 WASH. L. REV. 743, 756-58 (1968).

workers, pushed out into a loose labor market, who will find it most difficult to find a new job.⁴⁶ Thus not only will that group be hit with the cost of being discharged with greater frequency,⁴⁷ the intensity and duration of that loss will likely be much greater for them than for any less marginal group.⁴⁸

In brief, if one considers the losses to a debtor who is fired because his employer is garnished to be part of the t_a of that collection game, that component is likely to be very high, sometimes far in excess of the creditor's total claim. The threat of garnishment, therefore, is a very effective weapon against a worker who justifiably fears the wrath of his employer. Especially if it can continue to be used even before and without a judgment (for instance, post-*Sniadach*, in the guise of a wage assignment),⁴⁹ it will often easily bring an insecure debtor to heel, because it is clear that putting that "punishment" mechanism into motion is close to cost-free for the creditor, at least as far as enforcement costs are concerned.

It is important to note again that as with repossession value-shrinkage, the injury to the debtor is not simultaneously an equal direct gain to the creditor.⁵⁰ In both cases, the loss amounts initially to mere destruction of value in the hands of the debtor. In fact, in both cases, the side effects of actually using the collection procedure decrease the likelihood that the creditor will eventually get all of his v out of the debtor. In both cases the source of the creditor's surcease, the things of value "owned" by the debtor, are diminished by the act of seizure. Of

46. I should mention here that whatever chance such an employee had of finding a job prior to his garnishment is distinctly decreased by the very fact of his being garnished. Since the garnisher can follow the debtor from employer to employer, any prospective employer who hears of the debt's pendency will be even more loathe to hire the debtor than the prior employer was to retain him.

47. Moreover, it is just this confluence of factors which determines that the workers least valuable to the employer for other reasons are the most likely to be discharged because of garnishment which will make the enforcement against unwilling employers of any no-firing-for-garnishment statute, e.g., *N.Y.C.P.L.R.* § 5152 (McKinney Cum. Supp. 1970-71), extremely difficult. *Post hoc propter hoc* will as usual go some way toward pinning a discharge on an employer as garnishment-inspired, but substantial evidence of other grounds will make the pinning much harder. This is especially so if the employee responds to the garnishment with a despair which actually does affect his work.

48. Caution should be used here, however. The very precariousness of this sort of worker's employment makes the capitalized value of his job lower. That is to say, if he wasn't fired for this he was likely to have been let go for something else a little later. Garnishment would not ordinarily render a secure job untenable, but merely intensify existing insecurity. It would function most frequently as a stomp on the fingers of a cliff-hanger.

49. Wage assignments are interdicted by statute in some states. See, e.g., *MO. STAT. ANN.* § 432.030 (1952). In bankruptcy they have for a long time been treated as anomalous non-surviving liens. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 242-45 (1934).

50. Though in both cases the creditor will get something, either the goods upon repossession or the allowable portion of at least the first paycheck in garnishment.

course distribution of the net loss between the parties differs; in these cases it ordinarily falls much harder on the debtor-employee than on his creditor.⁵¹ And that is what makes the procedure such a potent threat. But when the threats to repossess or to garnish are actually carried out, either through ignorance or to establish credibility⁵² it may fairly be said that the system is behaving "spitefully," that is, in a manner harmful to both the central participants.⁵³

D. *Spite: A Value Secreted in "Transaction Costs"*

Up to now we have assumed that all t decreases the amount of v left in the system. But this assumption is often untrue in practice; t may also represent the price of additional "goods" purchased by the two parties for themselves. The most important of these, which is as real and valuable as cars and coats, is spite.⁵⁴

The nature of spite can be exposed most starkly by reference to an illegal but common subspecies of collection, the protection racket.⁵⁵ Consider an extortioner approaching a potential victim with the following proposition: "Give me \$100 or I will break the plateglass window of your store."⁵⁶ Assume that (a) the plateglass window is uninsured; (b) it can be replaced for \$100; (c) the crook's cost of breaking it is \$10; and (d) breaking the window once is within the crook's power, but no further depredations against the victim are. Obviously, it would make no economic difference to the victim whether he paid \$100 and kept the window intact, or refused to pay, had his window broken, and replaced it at a cost of \$100. In either case he is out \$100.

To the extortioner, however, what the store-owner decides makes a

51. Consider the following example. Let v equal \$100. Let us assume that D is employed with a take-home pay of \$50 per week, all of which is subject to garnishment. D defaults, and C garnishees D's employer and receives \$50. D is fired. If it takes more than one week for D to get a new job, his loss exceeds C's (ignoring unemployment insurance and similar sources of tide-over income). And this still ignores a difference in the marginal utilities of money for C and D, any tax-connected amelioration for C, and the possibility that C will get the rest of his money from D or D's new employer if D is quickly reemployed.

52. See pp. 34-36 *infra*.

53. This "systemic spite" must be distinguished from the "personal spite" which is the subject of the next section.

54. "Credibility" is another of these "goods," but it will be considered later in this essay, together with the other information factors of which it is a particular species. See pp. 34-36 *infra*. There are most likely others too, for instance the joy of the chase, but they will not be explored here.

55. This game differs from typical collection only in that the claimant has not supplied or lost anything of value to the victim prior to claiming value from him. It is, in effect, an attempt to sell to an owner-possessor that which he already owns and possesses. Given that the "cost of goods sold" is zero, it is potentially a very lucrative business.

56. Actually, he is more likely to put his proposition in terms of protecting the window's fragile integrity from mysterious dangers.

great deal of difference. If the victim pays, his yield is \$100. If the victim does not, the crook's assets may be decreased by the cost of breaking the window (\$10). Thus while the cost of "cooperative" payment is zero (\$100 of value "belonging to" the victim is merely transferred to the racketeer), the cost of coercion is \$110, \$100 of which represents absolutely destroyed value (the difference between a window and a pile of glass fragments) and \$10 of which represents the crook's additional labor costs.

Naturally, the crook would strongly prefer that the store-owner pay rather than suffer the asset destruction. But to increase the chances of this outcome, the extortioner must offer some incentive. At a minimum, his proposition ought to be: "Pay me \$99 or I will break your window." If the victim decides to pay, he will be \$1 better off than he would be if the game were played. But the victim has the power to inflict harm on his tormentor. He can deprive the crook of any payment. If the crook decides nonetheless to engage in his game of destruction, the victim will have forced him into an actual out-of-pocket loss. Of course, to bring this about the victim must also hurt himself. He must insist upon an end-point for the confrontation more expensive for himself than the one proposed by the extortioner. What some economic analysis might overlook is that he is nevertheless very likely to do it.⁵⁷ People do it all the time.⁵⁸ The fulfillment of an urge to spite seems no different from the fulfillment of any other human desire. People pay to satisfy lust, hate, ambition and greed.⁵⁹ They also pay for this. As with any other good, of course, the demand for spite is never totally inelastic, and its value is never infinite. While it has some value for almost everyone, the more it costs the less likely it is to be bought.⁶⁰

E. *Power Over Transaction Costs: The Professional and the Consumer*

Up to now, by using the abstract constructs "C" and "D" as if there were no material differences among the various kinds of parties to half-

57. For some support of this generalization in the language of social-psychology, see Tedschi, Bonoma, Schlenker & Lindsfold, *Power, Influence, and Behavioral Compliance*, 4 LAW & SOCIETY REV. 521, 539-40 (1970).

58. In fact, cases like *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127 (1707), may be interpreted as asserting that slaked spite is a tort. See 1 F. HARPER & F. JAMES, TORTS §§ 6.11-6.13 (1956).

59. See W. LANGER, AN ENCYCLOPEDIA OF WORLD HISTORY (rev. ed. 1948), *passim*.

60. To an "objective observer" (whose existence is questionable in any market-value analysis) it sometimes appears that some people do not stop at the usual spite parameter—hurting oneself to hurt another *more*—but go on to the act of hurting oneself a lot to hurt another less. Domestic relations contexts are often quite rich, it seems to me, in examples of "superspite."

executed contracts, I have falsified the reality of collection practice. Abstraction, for all its usefulness, almost always does that.⁶¹ I shall now, so to speak, "decompose" the concepts C and D,⁶² into recognizable subclasses,⁶³ so as better to describe the variable impact of various collection strategies in different "typical" collection situations.

There are three fact bundles which together account for most contract collection problems. In one, interestingly enough, a consumer⁶⁴ is in the position of C, having fully or substantially performed while the merchant has not. The second finds the professional as C, having sold on credit or loaned money to a defaulting consumer. In the third major area of collection conflict, no consumers are involved, the underlying transaction having been within the production-distribution stream, not at its estuary. In each of these situations the costs, including the information costs, of the various collection transactions operate in importantly different ways.

1. *The Consumer as Creditor*

Picture a consumer who has just bought a color television set from a retailer for \$500 in cash.⁶⁵ The consumer takes the set home, tries it, and finds that it is defective to the tune of \$50, that is, that it would cost \$50 to bring the television up to warranty. In these circumstances the consumer is a creditor; the retailer has possession of \$50 of parts and services "belonging to" him. The consumer approaches the retailer and asks him to repair the set. The retailer refuses. This leaves the consumer with only coercive collection if he is to recover the \$50. But legal action may not be for him a realistic alternative; the t_c of such a move, the cost of hiring a lawyer, filing papers and so on, is

61. At least two intellectual fallacies are the usual mechanism for this falsification process. The first is "composition," a thought process wherein one deals with an individual member of a class as if it were a particular real instance of a composite average of the class. Closely allied is the fallacy of "misplaced concreteness." There the error lies not in treating individual class members as composite averages, but in treating all members of a class as identical with one particular member. See also Leff, *Contract As Thing*, 19 AM. U. L. REV. 131, 132-37 (1970), for a more extended discussion of the dangers of classification, there centered on the word "contract."

62. The process might also be described as "applying Occam's hair restorer."

63. It hardly needs saying that this process will not reach any point of ultimate decomposition. That would demand treatment of a one-member class, an individual, as such. I will have to stop with subclasses of C and D which are still quite crudely abstract, within which more precise differences might still be immensely significant. Thus the play of the two fallacies discussed above will be, at best, restricted.

64. By "consumer" I mean a non-business acquirer at retail of goods, money or services for his own or his family's use.

65. The consumer's position is likely to be the same whether he has paid cash for the set or has "only" given a negotiable note. Because of the holder-in-due-course doctrine, he will probably have to pay cash to the eventual holder of the note, no matter what is wrong with the deal or the set.

likely to be in excess of the \$50 at issue,⁶⁶ while the merchant need not until then expend any t_a .

Some consumers in this position would disregard the economic disadvantages of going to the law and would sue the seller out of spite. But even assuming that a consumer were so inclined, he would likely find his purpose frustrated, for much of the potential destructiveness locked into repossession and garnishment⁶⁷ hardly affects professional debtors at all. A merchant faced with an adverse judgment is better able than a consumer in a similar situation to interdict property execution, by paying the judgment or posting a bond, or at least by showing up at the execution sale to restrict the frigidity of any "chill."⁶⁸ And if a consumer were to garnish a seller because of his post-judgment obstinacy it would not be wage garnishment, with all its threatened injuries. If the garnishee is the retailer's bank (the most likely target, since it is his most solvent and notorious debtor), the ramifications on the retailer are likely to be minimal; he is unlikely to be "fired," even from his account. Thus our hypothetical businessman can allow the consumer to pursue his legal remedies with relative impunity, for none of the consumer's options can force a risk of much more than the \$50 claim. That is not much satisfaction for the consumer to buy—merely preventing a windfall. It ordinarily demands "superspite," that is, infliction by the consumer of greater harm on himself than he can inflict on his enemy. It may still be done; the history of law is filled with cranks (lawyers or clients, it's often hard to tell) who spend large and unrecoverable sums to assuage feelings of outrage, moral or economic.⁶⁹ But it is not bloody likely. We thus have a classic and unhappy creditor situation: the consumer as creditor can officially recover through judicial coercion no more than the amount by which D is in default, but to recover anything he must expend some t_c , perhaps more than the v in issue, while to cause that initial expenditure D need spend no t_a . If the ultimate t_a of a full coercive collection is also low compared to the t_c necessarily involved, and the t_c will not be borne by

66. See discussion pp. 22-23 *infra* for the economies of scale enjoyed by professionals for whom recourse to judicial coercion is common.

67. See pp. 11-17 *supra*.

68. This option is theoretically available to consumer Ds too, but they usually don't have the money to buy in for a lump sum, being *ex hypothesi* credit buyers in the first place.

69. See, e.g., *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188, 86 N.W.2d 689 (1957), involving a \$138.50 claim against a bait advertiser litigated to the Supreme Court of Minnesota. Moreover, just as the welfare bureaucracy has replaced some of the functions of Tammany Hall, so have the O.E.O. Legal Services Offices stepped in to supply, at public expense, creative crankiness like Mr. Lefkowitz'.

D even if C eventually wins,⁷⁰ then it is usually economically rational for C just to abandon his claim.

2. *The Professional As Creditor*

When C is in the credit business, however, the impact of the factors noted above changes materially. Perhaps the largest components of t_c are the administrative and risk costs inherent in the due-process "adjudication" phase of the collection process. Naturally, it is to the creditor's advantage to avoid these if possible. Certainly he can avoid them by not playing the judicial-coercion game at all, by attempting to collect what he is owed by direct contact with the debtor.⁷¹ But as noted earlier,⁷² to avoid judicial coercion altogether is to fail to get the power of the State, the ultimate in civil puissance, on the creditor's side. Thus, if the creditor can get to the execution phase without the costs and risks of an adjudication, it is tempting to try to do so. This can be done most inexpensively if the other party fails to show up and the judgment, that pass-key to judicial coercion, is procured by default. There are a number of ways to encourage default,⁷³ but there are indications that consumers need very little encouragement.⁷⁴ Largely because of the prevalence of default judgments against consumers, the cost of the initial adjudication-phase t_c is remarkably small in the vast majority of cases in which businessmen are creditors and consumers are debtors.

That does not mean that a default judgment is cost-free. But efficiency in the legal context is like efficiency elsewhere, it is in large part a function of standardization and repetition. The lawsuit will ordinarily require an attorney, but at the summons and complaint stage he needs relatively little extra time or effort to file two suits rather than one, or eight, or sixteen for that matter. In fact, in businesses which combine large volume collection with no concern about the effects of indiscriminate and excessive behavior on business reputation,⁷⁵ it may

70. Insofar as this allocation of collection expense is a creature of contract, it is unlikely to favor the consumer-C, who is awfully unlikely to have drawn up the contract involved. See Leff, *supra* note 61.

71. This contact, of course, may take many forms, from wan request, to harassment, to bodily harm, to death. Beyond is rare, though there is such an implication in certain religious collection efforts where, notably, civil process is not available.

72. See p. 8 *supra*.

73. See H. KRIPKE, CONSUMER CREDIT 301-07 (1970), for a brief introduction to sewer service, cognovit notes, and cognate oppressions.

74. See, e.g., D. CAPLOVITZ, DEBTORS IN DEFAULT ch. 11 (Temp. ed. 1970); Note, 14 U.C.L.A. L. REV. 879, 880 (1967).

75. See pp. 35-36 *infra* for a discussion on the importance of this factor.

be cheaper overall to standardize all activities and “go to law” immediately in every case, without regard to the specific facts of the specific debtor’s problem.⁷⁶

In addition to reaping benefit from specialization and standardization, professional creditors may be in a position to externalize a great many more of their costs than can consumers. First, for all Cs there is subsidization by the State of some of the costs of recourse to the judicial system. That which the State takes in payment for the use of its information-generating and force-applying mechanisms is ordinarily less than its expense in supplying those services.⁷⁷ Second, when one gets to the point of execution one often finds instances of administrative costs being shifted to persons who had nothing to do with either the debt-generating or debt-defaulting transactions. As noted earlier, this is notably the case with respect to garnishment where the employer rather than the creditor or employee-debtor must expend the cost of organizing an installment payment plan.⁷⁸ Third, both by “agreement” and by operation of law much of C’s administrative expense, which would ordinarily be part of his t_c , may be transferred to D. This simultaneously decreases t_c and increases t_d , thereby giving super-leverage to the move as a species of coercion. Insofar as this shift depends on contracts it will vastly favor the drafter of the contract, who is likely to be the professional.⁷⁹

Thus the merchant-creditor has far greater opportunities than does the consumer-creditor to decrease t_c by externalizing or shifting some portion of it, a move which under our earlier analysis should massively increase C’s power to force a settlement agreeable to him. But the merchant-creditor’s compensatory weapons do not stop there. He also has a very much greater power than a consumer-creditor to increase t_d . One need not here repeat all that has been said previously about the destruc-

76. See Patterson, *Foreward: Wage Garnishment—An Extraordinary Remedy Run Amuck*, 43 WASH. L. REV. 735 (1968).

77. It is wrong, I think, to describe this subsidization by the State as something necessarily nefarious, as though the State were discriminatorily “acting as a collection agency” for creditors. In most contexts the State subsidizes the enforcement of its own laws. For instance, the State subsidizes the operation of the criminal law so as to make it cheaper for the victim (or his heirs), and frequently for the criminal too, than private revenge. And it is also usually cheaper to call the fire department than to keep one’s own fire company. Unless the collection of valid debts is itself evil, it is not made so by being made a social service. But insofar as other factors, such as those discussed above, serve to inhibit one kind of C from using the law and taking advantage of the subsidy, it does function as class legislation.

78. See pp. 14-17 *supra* for a discussion of this technique for transferring t_c , especially with respect to how it tends also to generate additional t_d .

79. See note 70 *supra*.

tion-of-value aspects of property execution and garnishment. They form a clear "cost" to a D who goes through the whole coercive collection game. Even if, therefore, spite is beneath a presumably rational businessman, and credibility and reputation are ambiguous "assets" in this context,⁸⁰ the combination of (a) the merchant-creditor's power to limit his own t_c , (b) his power to shift it, and (c) his power to increase his opponent's t_a weighs very heavily against there being any substantial practical effect, as to him, of the paradoxical disadvantage of being a creditor under American law.⁸¹

3. *Professionals On Both Ends*

There is a third very common situation in which one party fully performs before the other completes his performance: transactions between businessmen. When those transactions lead to dispute, businessmen avoid the judicial-coercive system, that very flower of Western common law, like some rare Asiatic plague.⁸² They go to law only under very special circumstances and as a last resort.

For any two businessmen the components of both t_c and t_a are likely to be roughly the same.⁸³ Both parties are likely already to have established mechanisms for dealing with disputes. Whatever economies come from the differential between their scales of operation are likely to be small. Except when a businessman is *in extremis*, those gross harms that may be visited on him by carrying out legal execution are harder to inflict; he usually has more room to maneuver and pay up prior to being sold out. The risk-of-loss-of-v factor still favors the businessman who in the particular instance occupies the D chair, but a careful C who is willing to spend for representation can usually soften the risk of total loss.⁸⁴ In general, then, t_c and t_a are not likely to be wildly different.

80. See pp. 34-36 *infra*.

81. See p. 5 *supra*.

82. See, e.g., Jones, *Merchants, the Law Merchant, and Recent Missouri Sales Cases: Some Reflections*, 1956 WASH. U.L.Q. 397, 411-18. Cf. Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963). Businessmen even seem to avoid "private" litigation. I have been told by a student of the garment industry (the results of whose study are not yet published) that in that industry, with about 35,000 separate firms and incalculable separate transactions almost all of which are subject to a standardized arbitration clause, there are about 200 arbitrations each year.

83. But see Macauley, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 WISC. L. REV. 483, 740.

84. This is another reason why businessmen, when they do "go to law," go to arbitration rather than to court. See L. FULLER & R. BRAUCHER, *BASIC CONTRACT LAW* 588-90 (1964), for a sophisticated lawyer's view of the process, containing roughly equal amounts of overt approval and barely suppressed hostility to its lack of legal aesthetic.

But considerably more important for avoiding the coercive collection game is the availability of a strikingly effective alternative procedure, one which while not abjuring threat and coercion, avoids the costs and dangers of the official varieties. It depends not on force, but on the exchange of information. The “solution” to many of the divers disputes between businessmen takes the form of some variation on one of the following scenarios. The scene of each is simple: split screen, two telephones:

1. *Buyer:* Hello, Morris? Those widgets you sent us. They’re breaking every minute. You want me to pay for such junk?
Seller: Look, if your men don’t know how to use widgets right, what do you want from me? They’re just what you ordered, Grade A-2 stainless steel widgets.
Buyer: Stainless steel they’re not. Swiss cheese maybe, orange-crate wood, but not steel.
Seller: Look, Kevin, maybe we’ve been having a little quality control problem—just temporary. Do the best you can and we’ll make it up next time.
Buyer: OK, but don’t forget. The noise of popping widgets my partner doesn’t have to hear.

2. *Seller:* Hello, Kevin? So what’s with our last bill?
Buyer: My bookkeeper’s been sick.
Seller: Uh huh. Your hand cramps when you pick up a pen?
Buyer: Soon, Morris.
Seller: How soon? Tomorrow?
Buyer: Come on, Morris; did I make such a stink when you were shipping out those cardboard widgets?
Seller: OK, OK. Maybe I’ll give you a couple of weeks more. You’re not *really* in trouble are you?
Buyer: Absolutely not. I got plenty of orders. Go check with some of the other guys.
Seller: Don’t worry. I already did. OK, take a couple of weeks. Give my get-wells to your bookkeeper.
Buyer: Hah!

3. *Seller:* So Kevin? Morris. Where’s the money?
Buyer: Soon.
Seller: It’s been soon a long time. Now it’s now.

- Buyer:* Look Morris, I could have gotten the stuff from Acme or Nadir cheaper. I gave you the trade.
- Seller:* Now you're giving me the business. Now! Or there'll be trouble.
- Buyer:* Tell you what I'll do. I'll pay you today, right now, what I could've got the merchandise for from Acme.
- Seller:* Tell you what I'll do. I'll break your head is what I'll do. We got a goddam contract Kevin, and you pay the goddam contract price.
- Buyer:* Morris, you don't like my deal, sue me with your contract.
- Seller:* I may and I may not. But one thing I know I'll do; anyone asks me if you pay your bills *the answer is no*. [The last clause is delivered in a high-pitched shriek of absolute credibility.]
- Buyer:* Morris? Half today, the rest at the end of the month?
- Seller:* OK.
- Buyer:* My best to Ethel.
- Seller:* You too. Remember me at home.

It would be folly to characterize these solutions as "coercive" or "co-operative;" *they are deals* and like all deals partake of both elements. But one thing is perfectly clear: this form of solution depends upon the generation, transmission and communication of information and threats of information. And another thing is also clear: until one begins to understand this method of collection, one understands nothing.⁸⁵

III. Communication and Collection: Information as Power

The importance of information in collection practice depends upon its peculiar power to supplement force, and frequently to supplant it. To the extent that actualized coercion is a source of waste in the coercive collection game, its replacement by successfully communicated information offers the prospect of greater efficiency, and, depending on one's definition, perhaps more justice.

A. *Reputation: The Past As Property*

If parties had perfect information about each other, the nature of collection law, perhaps even its existence, would be irrelevant. Picture

85. See Macaulay, *supra* note 82.

a world without collection law, a peculiar exercise, but one not beyond the purview of useful analytic fantasy. After all, all one must do is imagine a society in which not only had *Slade's Case*⁸⁶ not yet been decided, but also in which the law did not enforce partly performed contracts at all, recognizing no claims on things of value except possession, or removal from possession by force or stealth.⁸⁷ Would such an apparently massive change in American law make any difference? At first glance it would seem so, for in such a world the end-point of any collection game would seem to be identical with the walk-away point. In such a legal universe, it would appear at first glance to be irrational for sellers to enter into any credit transaction. Commerce would have to operate wholly through carefully planned instantaneous exchanges.

But that's silly. The decision about entrusting would still be made not on the basis of the *law's* effect on the rate of repayment, but on the basis of total experience with the *actual* rate of repayment, the shaping of which is a function of coercive law to only a limited extent.⁸⁸ Partially executed contracts would for a variety of reasons continue to be completed some of the time despite the apparent legal and economic absurdity of such activity. Most people carry out their agreements because they carry out their agreements, not because awful things will happen to them if they don't.⁸⁹ But equally important, even within an imaginary society which had credit transactions but no legal enforcement, there would still be a powerful source of non-ethical, rational impetus toward repayment. Assuming that trades involving temporal performance differentials are functional in the society, the power to take part in such transactions has value. It follows that exclusion from that system, or a disproportionately high entrance cost, both of which would follow from a reputation for default,⁹⁰ is a species of rational economic coercion. That is, even if one's present purse is trash, one's

86. 4 Co. Rep. 91a (1602). How much of a change in actual English law *Slade's Case* made is one of the subjects of a marvelous passage in S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 300-04 (1969).

87. See H. MELVILLE, *MOBY DICK* ch. 89 ("Fast-Fish and Loose-Fish"), reprinted in E. LONDON, *THE LAW AS LITERATURE* 599-602 (1960), for the description (in a tone of whale-like sportiveness) of a species of "trade association" private ordering approaching such a legal situation.

88. I am not saying that access to omnipotent power has no effect on the rate of repayments, but only that such power is not the single, sufficient (or even necessary) causal factor determining the rate.

89. It is most likely true that this impulse is connected with the law's command in some way, but that way is hardly simply causal in either direction. Cf. Griffiths, *Book Review*, 79 *YALE L.J.* 1388, 1462 and n.291 (1970).

90. It is likely that the mechanism of this cost increase would not be a rate shift by a specific lender, but a refusal of all but higher-priced lenders to deal with the particular borrower at all.

good name may represent a large portion of any hope for a future purse.

"Reputation," then, for these purposes, may be defined as a measure of a particular person's positive or negative predicted deviation from the other party's average predicted t of collecting from him. If information about a person's reputation were perfect,⁹¹ there would be no such thing as a collection problem. The sole "collection" practice would be precise pricing of the initial transaction. The end-point of every individual credit transaction being identical with the price, no longer would any cheerfully quick repayer subsidize the slow, slovenly or evasive borrower.

Such prediction-perfecting information is impossible as a practical matter; generating it without cost is impossible even in theory.⁹² Even if such a state could eventually be approached by methods so efficient in gathering, correlating, evaluating and communicating information that the cost justified the expenditure,⁹³ it might still be objectionable to do so on non-economic grounds: the loss of privacy and autonomy might itself be too high a "price" (on another but equally "real" scale) to pay.⁹⁴ But that it is hopeless and maybe horrible to contemplate a

91. "Perfect" is here used in its most expansive sense, not merely that everyone knows what anyone knows, but that everyone knows everything.

92. Fact-finding requires that expenditure of energy, and generalizing and predicting upon the basis of those facts demands a large dollop of pure faith. See N. WEINER, *THE HUMAN USE OF HUMAN BEINGS* (1954), especially at 28-31 (on "paying" Maxwell's demon for information) and 188-93 (on the necessary "faith" of scientists). See also N. WEINER, *CYBERNETICS* 92-93 (2d ed. 1961). Among other difficulties, the *ceteris paribus* clause we all carry around in our confrontations with the future is a stipulation which reflects the limitations of human reason, not a covenant successfully wrenched from the Almighty.

93. See Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089 (1969). In addition to what one might call the "cosmic" constraint on this kind of information perfection, there are numerous practical "inner" constraints, among them: (a) the limited capacity for information of even the largest computer; (b) the power of people and firms to change and suppress identity; (c) the differential staling rate of otherwise relevant information; (d) the failure of financial data to present a sufficient picture of a person upon which to base even financial decisions; (e) the difficulty of establishing the "truth" about any transaction; (f) the non-linear nature of personality such that projections through time of human history cannot be straight-line extrapolation (or even vector diagrams); and (g) the immense cost of coping with all these technical problems.

94. There is a map of the City of New Haven ca. 1750 extant (reproduced in R. HORDEN, *YALE: A PICTORIAL HISTORY*, Part I, fig. 9 (1967)), which shows a town so small that not only is each individual house drawn in, with the name of its then owner, but the resident's occupation—lawyer, farmer, farrier—is also indicated. In a society like that, the normal buyer-seller relationship would involve levels of knowledge about the past, and a claustrophobic sense of a predictable future, almost unimaginable in modern mass-transaction terms; it is like being married to one's customers and suppliers. There is something cozy about this and, over time at least, something quite "just": one pays and is paid for who one is. But even if this knowledge were perfect in only a limited sense—everyone knows what anyone knows—it would be stultifying enough to help explain the lure of the frontier, where accident and uncertainty would allow a rating (commercial and other) which, strictly speaking, one didn't *deserve*. The state of being

world in which every individual's reputation was perfectly known hardly means that less than total information is valueless, or that it is not an important factor in collection strategy and efficiency. Since reputation has an effect upon the price at which one can deal on credit in the future, it is an asset subject to value fluctuation. Since reputation is a species of information, it can be modified by other information. Thus anyone who can deliver information which will modify a reputation, and communicate that reputation as modified to others, has the power to change the value of an item of another's property. Not only, then, can C threaten absolutely to decrease the value of D's goods by repossessing them, or of his labor by garnishing his wages, but he can also threaten to depreciate the value of his reputation by communicating his displeasure.

But just because here as elsewhere we are all at each other's mercy, it does not follow here either that jeopardy is equal. There are two major jobs involved in effectively deploying information for this purpose: (1) collecting, collating and cumulating the "bits" of input out of which the reputational messages are constructed; and (2) transmitting those messages to interested listeners. Because of differences implicit among our three paradigm dispute situations, especially with respect to the kinds of information involved in each situation and the organizational status of the different classes, the costs of these operations, and thus their efficiency and effectiveness, vary materially.

The critical factor about businessmen is that they have at their disposal for the exchange of information about each other preexisting communication networks. These channels, necessary for the exchange of orders and instructions for trading, are hardly overloaded by those messages, and reputational data can be added at a low marginal cost. Moreover, these channels are directionally precise. They are built in a network which links people who trade with each other, to whom information about each other is certain to be of interest. A jobber's default is to a goods distribution industry what a man's shampoo is to *Playboy Magazine*: the number of random or uninterested readers it "reaches"

in a tight enough social set to get one's just desserts, no more (even if no less) may not be so very awful, but at least the literature implies otherwise. See, e.g., Ford's *Parade's End* (a contemplated suicide over the calculated wrongful dishonor of a check), *Vanity Fair* (with its exquisite feel for the central importance of "credit") and even *Emma* (with the boredom of not misunderstanding).

In sum, what I am talking about here is not so much the "loss of privacy" as the loss of chance, which is also the loss of unreasonable hope. See Miller, *supra* note 93, at 1107-27.

is kept to a minimum.⁹⁵ In addition, the previous information which has been carried on the network makes it easier for additional bits to be linked accurately. One prime rating problem, for instance, tying adverse information to a particular party for use in future transactions (a problem cognate to establishing the good will or bad will of a trade name), is mitigated in industries where participants know not only corporate names but principal's names; Cupcake Custom Cutters may go out of business, or change its trade style, but its owners, if known, will be quickly recognized under any new avatar.

Information among merchants about consumers—their so-called credit ratings—profits less from these institutional efficiencies. The chief constraint is the size of the group to be known. Consumers too can move, change their names, buy under other names.⁹⁶ But more than that, any particular merchant is likely to have but a few trades with any particular consumer. The information, to be of any real value, will have to be collected and collated with other transaction reports to give any kind of usable picture. Further, any individual transaction with a consumer is likely to form only a small element in a merchant's total business. When the total possible loss is small, charges for credit information bulk large.

Despite these considerations, the gross volume and risk still seem to justify the creation and maintenance of organizations organized and specialized for collection, collation, and transmission of credit information. These organizations have access to a large audience of individuals willing to tell, and to pay to know. Moreover, they are able to exclude those who will not pay with money and their own information.⁹⁷ Moreover, the transaction costs of the subscribers in modifying the debtor's reputations are less than those of the subjects. Picturing credit information as the memory core of a computer, the subscribers have better and cheaper access to both the input and output stations. They can get their versions of reality in and the computer's view of reality out much more efficiently than can the subjects.

As computers render these processes cheaper per unit, as one starts to approach the reality of a "cashless society," the usefulness of this device will continue to increase. It will never be perfect, of course, but

95. Since the power of information is a function of what is believed rather than what is true, it is also worthwhile to know information sources well enough to evaluate their credibility.

96. The "worst" consumers are likely to do the most of this.

97. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 137 n.4 (1970), for a concise description of the "freeloader" problem in a different context.

the threat to damage a credit rating will become increasingly effective as more and more information about past transactions can be economically delivered to a larger and larger number of persons who might enter into future transactions.⁹⁸

When C is a consumer, however, and D is a professional merchant or lender, the power of any threat to reputation is diluted. That does not mean that such a threat, express or implied, is without effect; it is cumulatively the most powerful and frequently a perfectly sufficient ground to assure full and fair performance by merchants.⁹⁹ To believe otherwise is to believe that a good reputation is not an important business asset—and if you can believe that, you can believe anything. There is no doubt that a discontented consumer can inflict *some* harm on a merchant he comes to hate—he can refuse to deal with him any more.¹⁰⁰ Moreover, to the extent that he can communicate his perception of the merchant and his products to other potential customers, he will be able to increase the harm he does.

There are several good reasons, however, why the consumer-to-consumer information network about merchants and products functions poorly, certainly less efficiently than the same mechanism among merchants. First, it is of no obvious economic value to any consumer to deliver adverse information about a seller to any other consumer. He may be otherwise motivated to do so—spite, pique, even conversational void—but these motives are not conventionally economic. Insofar as it costs him nothing to do so, for instance in casual conversation, he may

98. Any successful effort to curb the remedies available to (and thus threatenable by) the creditors within the judicial-coercive game will tend to increase the use of this information-coercion technique. Not only will it become the only game in town, but the need to rely solely upon it will tend to bring more creditors (and more of their information) into the system, thereby decreasing the cost/benefit ratio both by decreasing cost (because of natural economics of scale) and by increasing benefit (because there will be more complete information deliverable). Still further, t_c currently expended in the judicial-coercion game will be available, willy-nilly, for the information-coercion game.

Naturally, that will mean that abuses within this credit-rating system (notably false or tendentious information) will need regulation, especially kinds designed to facilitate access to the information pool by the rated debtors. See Miller, *supra* note 93. It will remain to be seen whether this regulation will develop, or whether the professional's natural economics will mandate that the consumer-debtor will be worse off in a purer information-coercion game than under the present system.

99. It should be recalled here, however, that just as most consumer-debtors pay their debts because they owe them, and not through fear of any sanction if they don't, most merchant-debtors carry out their obligations for the same reason.

100. This is not so easy when dealing with monopolies, of course, especially if there are no available functional equivalents for the monopolist's service, for example, telephone lines. And oligopolies which refuse to make a safe car pose a similar problem for persons safety-conscious well beyond the range of most of his fellow consumers. But assuming the merchant has competitors and is in a business where more volume means more profit (which is, after all, not uncommon), a refusal to deal with him is a species of market discipline.

affect reputation with his adverse commentary. If consumers were self-consciously a class, like tradesmen in the same trade, they might spend money on such discipline, for it is a benefit to all consumers to drive the wicked and nasty out of business. But at any given moment the act of spending money to convey the adverse information, since not necessarily followed by others' spending to inform, or to support an information-collating institution, seems to the individual consumer like a conferral of a gift.¹⁰¹ Thus the transmission of this adverse information is likely to stay unorganized, with no pre-existing, pre-paid channels available for its transmission.¹⁰²

In the absence of such specialized information-organizing institutions, the consumer must distribute the adverse information himself. His media for that communications effort does not transcend his normal communications network—talking to people with whom he has an otherwise established relationship. But these others to whom he might deprecate the merchant-offender do not necessarily have any pre-existing interest in his information; not everyone is contemplating the purchase of a new television set at the time the reporter's discontent over the one he just bought is articulated. In other words, he is not quite as bad off as one who advertises Enovid in the *Diocesan Weekly*, but neither is he as well off as an abortionist taking a column or two in *Women's Liberation Now*, or even as well off as a merchant talking to another about a third.¹⁰³ While the merchant need check only the consumers in whom he is interested, when he becomes so, the consumer who hears evil of a seller usually must store the information for a period of time. There is, therefore, a good deal of random noise.

In addition, there is a time lag in all information. If a merchant can get in and out quickly enough, he may make a killing before his bad reputation catches up with him. And in any event "he" is likely to be "it," a corporation, the destruction of which through adverse comment is likely to entail only the loss of the promoters' cash investment (around \$3.86) and rarely any "bad will" for the promoters themselves. Their identity is hidden from future marks, as it is not from other professionals, by their trade-name corporate shell. For the general purchasing

101. See note 97 *supra*.

102. *Consumer Reports* is the obvious (and presently quite lonely) example of such pre-spending to buy an information wave-length.

103. In exceptional circumstances, when consumers can be organized to communicate on a very precise channel (e.g., by picketing outside the seller's premises), the effects can be striking. See *Consumers Voice* (the newspaper of the Philadelphia-based Consumers Education and Protective Association [CEPA]). But that kind of organization is difficult, and depends upon a huge amount of unpaid labor.

public, they will frequently be able to “die,” only to arise elsewhere in a new incarnation, like a vulture from the ashes.¹⁰⁴

When the failure in performance is a failure in the quality of goods, moreover, it is even easier for a manufacturer to blunt the impact of bad quality by changing model names, styles and numbers. By so doing he destroys that *sine qua non* of competition, comparability. One of the unmentioned advantages of frequent new models is that a lemon of a 1967 is not necessarily presagent of a bomb of a 1968. And when the defect is one of the quality of goods, the information is notably more complex. Whereas the seller need only say (and hear) “didn’t pay up,” the shopping buyer must deal with all kinds of complex information in trying to decide if the product is a “bad” one. Anyone who has tried to use *Consumer Reports* has experienced the frustration of deciding between a superb Frammis with a shock hazard and a not-so-fine Wudgis without. It is hard, that is, for a consumer to be a purchasing expert with respect to the full panoply of things he may from time to time buy. To evaluate all information is to invite sensory overload and a final tendency toward impulse buying.¹⁰⁵

I do not want to overstate this, however. Threats not to deal in the future, and to make known one’s discontent are effective, at least against businesses cherishing long life and good reputation. In addition, there are information brokers working on behalf of consumers; department store buyers, for instance, are purchasing experts, and for very good economic reasons of their own prefer to sell the goods of sellers whose goods perform.¹⁰⁶ In addition, competitors of the offending merchant should be willing to pass on adverse information from consumers about other sellers as part of their selling campaign (though they do so with startling infrequency).¹⁰⁷ In general then, while generating bad reputation for merchant-Ds is the consumer’s best weapon, it is less efficient than the merchant-C’s comparable weapon, credit rating destruction.

104. Thus the worst offenders are likely to be the least harmed by these competitive forces. See, for instance, the “corporate history” set out in *State of New York (ITM, Inc.)*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303 (Sup. Ct. 1966), which deals with the notorious Reuben Sterngass’ highly lucrative New York referral-sale swindle.

105. Other psychological factors seem also to be at work. See, e.g., the papers on “cognitive dissonance” in H. KASSARJIAN AND T. ROBERTSON, *PERSPECTIVES IN CONSUMER BEHAVIOR* 158-93 (1968).

106. See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47-48, 63-64 (1969).

107. It may just be that this “anti-advertising” shares the normal limitations of ordinary advertising, among them: (1) information about Brand X from the manufacturer of Brand Y is subject to credibility discount; (2) it is hard to get a customer to hate Brand X without some of this massive negative reinforcement spreading to the whole category of which Brand Y is also a variety; (3) the technique of identity and model transformation inhibits anti-advertising as much as it hinders word-of-mouth reputation injury.

B. *Credibility: Reputation As a Factor in Negotiated Settlement*

There is one special subcategory of information which deserves treatment: in terms of my graphics, data about the likelihood of a party's going to a coercive-play end-point rather than settling at some point on $L - L_1$. Except when spite is being purchased, the purpose of allowing the parties to inflict various injuries on each other is to facilitate threatening. But the magnitude of the injury is merely one factor in the effectiveness of the threat, the other being the likelihood of its coming to pass. Once again to put the situation into the simpler protection-racket context, if the victim continues to refuse to pay despite any threat the crook might make, then within the single-play context of that particular confrontation it is totally irrational for the extortioner to go through with any of his threats. The extortioner starts with zero. If he walks away, his end-point is zero. If he carries out his threats, he ends up at $-t$.¹⁰⁸

But that t also buys something else which has value: other victims (and this victim next time) are more likely to believe his threats in the future. To a racketeer this is a capital asset; call it "credibility."¹⁰⁹ Possessing it, he knows that future victims are less likely to behave so "irrationally" as to reject his generous offer to settle for less than the replacement cost of the window.¹¹⁰

Lifting this lesson out of the context of extortion into that of "legitimate" debt collection, however, requires a few important shifts. First, a creditor (as opposed to a racketeer) cannot walk away cost-free. By hypothesis, if he walks away he forfeits v in the debtor's hands. Unless $t_c > v$, C must play if he is to recoup any of his loss. Even when $t_c = v$, he should definitely play; his net recovery will be zero within the game, but he will gain in credibility. But the demand for credibility is not totally inelastic, any more than it is for spite; if $t_c > v$ by too

108. It should be mentioned here, however, how inexpensive destruction can be, since value (use, beauty) is so directly a function of organization. To restore something to its normal entropic state requires only sufficient force to jar artificial arrangements, and pretty naked and unorganized force will often do. This applies to all kinds of tenuous arrangements of components whether molecular (like windows and lives) or social (like universities). In fact, it might well be argued that the chief function of law has been to oppose that very cheapest method of restoring entropy, violence, and demand recourse instead to more expensive modes, like the process of the law itself.

109. See pp. 18-19 *supra* on spite. It is important to recognize that neither spite nor credibility as factors in the collection game may be added to either t_c or t_d , for t represents a *loss or expense* of a party consequent upon playing the coercive game. Spite and credibility, on the other hand, are *values acquired* by the decision to play. Thus they tend to cancel the impact of t_c and t_d , not increase it.

110. Of course, there are other reasons he might go through with his threats, including sadism and ego protection ("Nobody treats Big Julius like a punk"). I leave it to everyone's taste whether any of these motives are "irrational."

much, the extra credibility may just not be worth buying in that particular play.

There is, however, another difference between extortioners and creditors which further complicates the credibility-purchase factor. In extortion the "business," the whole business, is collection. The relationship between the parties is one imposed by the extortioner. Every evidence (including wanton destructiveness) of his intransigence—even at great risk and cost—ought to serve to increase the amount of his collections. A reputation for swinish persistence and conscienceless destructiveness is the principal "good will" item on his balance sheet. But in business, the relationship between the parties which gave rise to the initial transfer of *v* must be consensual.¹¹¹ If we define "good will" as an established, reliable momentum of use which increases the wealth production of the components (capital, labor) of an organization of those components,¹¹² then the information that one will not walk away, but will spend to vindicate one's rights, buys both good will and bad will. It increases yield in dispute situations, but also to some extent discourages anybody from dealing in the first place. Thus any enthusiastic collector who is also a seller must temper his collection devices by knowledge of their possible effect on his future gross volume. It follows that if a seller can keep much of the produce of threatening and nasty collection behavior while deflecting a large portion of the hostility such procedures may engender, it will pay him to do so. Hence this is an additional factor encouraging the use of collection agencies and negotiable-note third-party financiers. The seller gets some of the fruits of the aggression, but the collector gets most of the hostility, that is, the reputation for thoroughly rotten pertinacity is externalized from the seller to the collector. But the collector is not selling anything to the class of persons who come to hate him; as to them, he is in the position of an extortioner, selling them only freedom from his own behavior. They cannot discipline him by refusing to deal in the future, for dealing with him is not consensual anyway. To the extent the collector gets the reputation of being a son-of-a-bitch it is a good reputation, useful with the victims and with those who might hire his services. Thus, the "bad

111. It is precisely the fact that he originally acted with respect to *D* in such a way as to raise in *D* an obligation to reconvey *v* that makes *C* "legitimate."

112. I think this definition is accurate enough for these purposes. I personally prefer the unintentional definition given by Dr. Johnson when, upon being asked "what he really considered to be the value" of a brewery he was attempting to sell as executor of the brewer's estate, he answered, "We are not here to sell a parcel of boilers and vats, but the potentiality of growing rich, beyond the dreams of avarice." 4 J. BOSWELL, *LIFE OF JOHNSON* 87 (entry for April 4, 1781) (Powell-Hill ed. 1934).

will" component of aggressive collection practice, by being deflected into another business where unreasonable stubbornness is an asset, becomes all good will. There is thus a magical transformation of liability to asset as "credibility" moves between organizations each specialized to service only half of a unitary transaction (sale and repayment).¹¹³

Here again, it is more difficult for individual consumer-creditors to establish a reputation for credibility. Because the merchant has greater access to and control over the consumer's reputation than he himself has,¹¹⁴ the consumer's intransigence will be reported in the merchant's terms. A successful set-off for breach of warranty may well show up as "resisted payment" and little else. Moreover, as stated earlier¹¹⁵ the t_c/v and t_c/t_d ratios tend to be much greater for consumer-Cs than for merchant-Cs; thus, it is inherently less credible that the consumer-C will play the game to the bitter end and it will therefore cost him more to establish his credibility. Moreover, it is very hard for a consumer-C to hide from or externalize the bad-will aspects of his activities. For a consumer to go out of business is to die, and identity changing is quite difficult. Most important, there are for him no available institutional scapegoats (except perhaps "outside agitators"); there are no "payment agencies" cognate to collection agencies, nor is there a complainer-in-due-course doctrine.

IV. Communication and Collection: Information as Knowledge

A. *Predicted Ability to Pay*

There is one source of extremely high probability that an end-point (rather than a point on $L - L_1$) will be the finish to a collection confrontation, which has nothing to do with spite, ignorance or credibility buying. That is the inability of D to perform. Now, "can't" and "won't" often are not easily distinguishable categories. But there is vast difference between one who will not pay because the goods he bought disintegrated to his touch, and another who will not pay be-

113. Naturally this alchemical transformation would be impossible under an assumption of perfect information. In that case, the bedevilled buyer would know that the merchant had chosen notorious swine to collect his bills and would make him pay for it in future non-custom. But it is most likely true that when the consumer calls the merchant to complain about the garnishment threat he has just received, the response, "Gee, I'm sorry but Shreckmacher & Company is the holder of your note, and once they get it there's nothing we can do," will in fact take some of the heat of the consumer's anger off the merchant.

114. See pp. 30-31 *supra*.

115. See pp. 20-24 *supra*.

cause he is trying to steal from the seller, and between one who cannot pay because he has just been laid off from his job, one who cannot pay because he lost the wherewithal on a bad tip on a worse horse, and one who cannot pay because he doesn't want to borrow from his in-laws. A debtor who cannot in fact pay will not be enabled to do so by even the perfectly sufficient communication of a perfectly dreadful image of what will certainly happen to him if he does not. A threat is a method of redistributing things of value, not of creating them.¹¹⁶ Even letting a turnip know that a pot of boiling water is inexorably in its future will not get any blood out of it, and actually boiling it will merely turn a viable plant into a short and mean meal.

If a victim-pool contains only a few absolutely unable to pay, it might be administratively efficient to treat the whole pool as able to pay anyway, since any kind of differentiation often involves substantial administrative costs. But if a large proportion of defaulting debtors do not pay because they can't, and if the differentiation can be made at reasonable cost, the efficiency of the operation obviously increases. One would then spend to collect from and injure only those able to pay, and that policy if communicated would build a credibility more precisely of the type one would like to have as a professional creditor—potent but not spiteful. And equally important, one could also more efficiently expend his resources with respect to those who cannot pay, not on punishing them, but on arranging to maximize the amount they eventually will be able to pay.

In general, therefore, the more information one can gather about the status of the particular debtor in the particular situation, the better the answer that can be framed to the critical question: do I coerce or cooperate? To coerce the helpless is to waste money and effort; to cooperate with the deadbeat is to risk total loss. If, in fact, the majority of Ds, especially consumer Ds are in the can't-pay category,¹¹⁷ then any method which takes collection out of a coercive mode (judicial coercive or informational-coercive) and into a cooperative mode (where more time is given, earning potential is not interfered with and asset values are not destroyed) is likely to enhance the efficiency of the whole collection system, and benefit both Cs and Ds. But that demands particular

116. But a sufficient threat can change a debtor's self-perception of his state from "can't" to "can," for example, if C threatens to take D's house away, D may after all be able to face the sneers of his in-laws when he puts the touch on them.

117. This seems to be the case. See D. CAPLOVITZ, *supra* note 74, chs. 5 & 9. In fact, if one approaches "can't pay" somewhat technically, almost all consumer debtors fall into that category because of the ubiquitous acceleration-on-default clauses which transform time buyers into cash buyers as soon as they miss an installment.

information about individual situations. It demands, in effect, a different kind of communication, not among Cs and Ds about each other, but between an individual C and an individual D about their current situation. The economic, institutional and organizational constraints upon the efficiency of that form of communication will be the subject of the next section.

B. *Increasing Knowledge to Minimize Transaction Costs*

Insofar as modern retail market allocations are imperfect, it is substantially because the distribution of the produce of mass production does not lend itself to individual bargains based on individualized information.¹¹⁸ If one views modern collection practice as another species of mass transaction, it becomes quite clear that the same economic constraints lead to most of its imperfections: it is too expensive, given the current institutional framework, for collection transactions as currently designed to be handled individually on the basis of the peculiar needs of particular parties in particular instances. That is what the litigation system attempts to do; its failures illustrate the fact that one cannot easily customize dispute resolution any more than one can customize manufacture or distribution for a mass market.

A perfectly rational collection law,¹¹⁹ would be that process which produces, in each individual case, a settlement at that point on $L - L_1$ which represents the actual exchange originally agreed upon between the parties.¹²⁰ Because of the ubiquity of t , there is never an end-point of any coercive collection play which is north or east (that is, better for D or C) of any point on $L - L_1$; the best either can find is a point no worse, and then only under extraordinary circumstances, for instance when C actually recovers t_c from D.¹²¹ In the ordinary case, the entire length of $L - L_1$ is northeast of, that is, better than, the end-point of any coercive play. Thus the failure of the parties to reach some settlement point on $L - L_1$ is a typical kind of market breakdown,

118. See Leff, *supra* note 61 at 140-41; Llewellyn, Book Review, 52 HARV. L. REV. 700, 701-02 (1939).

119. I am here assuming the righteousness of the law's support and enforcement of the exchange mechanism. I am not so much rejecting Marxist, anarchist, syndicalist, socialist, etc. alternatives as ignoring them. And I am also assuming the legitimacy (for want of a better term) of the original agreement.

120. Keep in mind that both the voluntary-payment point and the walk-away point always fall on extensions of $L - L_1$.

121. And if one includes the risk component of t_c , that can strictly speaking never happen except when the transfer payment from D to C is in excess of actual out-of-pocket t_c .

one which stems from an institutional insufficiency which blocks the efficient exchange of information.

Let us look again at the common coercive-collection situation illustrated by Graph II where t_c and t_d are both > 0 , and $t_d > t_c$.¹²² Once again it is plain that the most important feature of the diagram is the blank space between the end-point (900/—200) and the points on $L - L_1$. But this time let us look at that space in a new way, as the pictorialization of a failure in communication, like the “———| |———” on a wiring diagram. For that is exactly what it is, a failure in the transmission of information. If the end-point were known and appreciated, it and every other point within the triangle described by points L , L_1 and the coercive-play end point would be eschewed.

One of the aims of any collection system ought to be to bridge that gap by turning the ———| |——— into ——— \ ———. This can be accomplished by supplying at reasonable cost a switch for the system which will allow the complex but relevant information to flow.

At the moment of default, the final resting place of the C-D relationship is a function of at least the following factors which must be accurately predicted by *both* C and D if a rational calculation is to be made by them: (1) what the Leviathan will do if solicited; (2) the costs to C and D of the State proceeding; (3) the values of spite, reputation and credibility for C and D; (4) the ability of the parties, both financial and organizational, to adopt certain courses, for example, paying in full, accepting less; and (5) the level of accuracy with which the other party is able to calculate each of the above. Ignorance of these factors by either of the parties is likely to produce, in any given instance, a competitive and bargaining disadvantage. As we have seen, however, not all ignorance that disadvantages one party will necessarily benefit the other; it may instead lead to the absolute loss of value within the two-party system. Consider, for instance, ignorance of the amount of harm that C can inflict upon D by going through the coercive game. Assume that C knows (as indeed he is likely to) that if he repossesses an item and resells it, the item will bring less in the open market than it is worth to D as possessor. This “destroyed” value may have to be recouped, if at all, as part of a subsequent deficiency judgment against D. Assume further that D could pay for the item as agreed, but he decides for one reason or another to be recalcitrant. So long as

122. See pp. 6-7 *supra*.

the likelihood and extent of t_d is not communicated to D, he is likely to undervalue the cost of recalcitrance when weighing it against the inconvenience of payment; and this tendency will be accelerated if D places a high value on spite. In such a situation, D might decide to go through the coercive collection practice even though full knowledge on his part would impel him rationally, even calculating his spite value, to compromise or even to pay at the voluntary payment point, so as to avoid coercive collection. If in partial ignorance of the true situation (factual and legal) D forces C to resort to coercive collection to recover v ,¹²³ he will have converted a zero-sum game into a minus-sum game, and it is only small comfort to C that most of the destroyed value falls on D.

Or consider a case which involves a misperception by C¹²⁴ about D's power to avert a punishing play. Assume that C believes that D is a deadbeat, that is, that D could pay if he wanted to but doesn't want to because he thinks he can get away with it. Such a perception may lead C to place a very high value on both spite and credibility. He will tend to overrate his chance of success in enlisting the power of the State on his behalf. He may, for these reasons, feel justified in expending substantial t_c (in court and/or for private harrassment), and he may have a corresponding willingness to inflict as much judicial and private t_d on his unfortunate debtor as possible. But if C's assessment of D turns out to be incorrect—that is, if D turns out to be unable rather than unwilling to pay—C will have inappropriately spent for credibility (getting a reputation as one who punishes the helpless), for spite (harming himself to harm an unfortunate rather than a true enemy), and for the power of the State (getting an uncollectible judgment).

It is frequently, therefore, also in the interest of both parties to increase each other's level of accurate information, and to facilitate the efficient mutual use of that information. As noted earlier, when the disputants are businessmen in a relatively cohesive industry the channels of information are likely to be relatively well-developed.¹²⁵ But

123. Common reasons involve misperceptions of the law, for instance that a set bought on credit for a wife need not be paid for by the husband if she moves out taking the set with her. See D. CAPLOVITZ, *supra* note 74, ch. 5, for this and similar errors.

124. See Rock, *Observations on Debt Collection*, 19 BRIT. J. SOCIOLOGY 176 (1968), for an exceedingly interesting study of creditors' perceptions of debtors, and their substantial likelihood of error.

125. One other factor which facilitates dispute settlements between parties with the likelihood of a shared future is their ability to settle a dispute at one time by adjusting the terms of a later deal. See pp. 25-26 *supra* for a dramatization of that important mechanism, whereby one compromised deal can be made to look like two smoothly working ones.

when one of the parties is a consumer, the situation almost always resembles the least hopeful of the merchant-merchant set-tos. It is still worthwhile for the disputants to spend to educate each other. In consumer transactions, however, that educational process is exceedingly inefficient, in the quite strict sense of costing a lot for a little bit of result. The first limitation upon efficiency is the absence of regular communication channels between individual seller/lenders and individual consumers. This has been discussed earlier.¹²⁶ But even if there were more precise channels of communication open between the specific parties, it is very silly for Cs and Ds who have no extensive shared past to trust each other. For while it is sometimes to the benefit of one party to educate the other about the “real” situation, it is frequently more valuable to keep him wrong or make him wronger. It pays to exaggerate how much “the law” favors you, how much harm you can do to the other party (via the law or without its help), how intransigent you always are (that is, how much spite is worth to you, and how very much t you are always willing to spend). As in any case where you can sell fantasy (which has no cost-of-goods-sold entry) in place of less favorable fact, it pays to lie—at least in the short run. This applies between businessmen, but much more when one of the parties, a consumer, has less experience with what the truth is likely to be. Thus the party being educated is likely to discount the value of the educator’s message if he is simultaneously the opponent in the transaction.

But more important, insofar as there is “communication” in merchant-consumer coercive collection, it resembles two chutes separated in space and time. A message triggers a reply. A reply, or a failure to reply, triggers another message, or another more coercive move. It is a game, and that’s the trouble, for it is not a conversation or a deal. The institutional arrangements—courts, lawyers, and sheriffs, credit reports and collection agencies—are such that assertion, denial, threat and counterthreat are fostered, but conversation and negotiation, both of which demand continuous interaction, are not. This is exacerbated when one of the parties is bureaucratized, with fine differentiation of function within the bureaucracy, or when collection is contracted out. It is, so to speak, exacerbatissimus when one of the parties is a computer with, to say the least, strong constraints upon its creative problem-solving powers.

126. See pp. 37-38 *supra*.

The point is that getting to L - L₁, and finding a sensible point on it demands learning particular reality and shaping to it a particular response.¹²⁷ But modern mass collecting is presently no more adapted to bargaining than is the modern mass selling and lending which gives rise to the bulk of coercive collections.¹²⁸ Assuming that such post-default individualized collection might better achieve individual-case fairness and efficiency, the question is whether an innovative system can be devised which will foster it without an undue increase in costs. It is no accident that much current collection practice is handled in a relatively rigid, stylized and automatic manner, based on stereotypes and game-like statistical strategies.¹²⁹ Just as there are economies in mass production and mass distribution, there are at least apparent economies in mass collection. Customized, individualized communication costs money. There does come a point where the additional costs of having personalized transactions may be too great; a little injustice may be a social good.¹³⁰ The real question is still whether changes in current practice can be designed which will simultaneously increase fairness and efficiency.

The problem of improving the flow of trustworthy and usable information in this market seems to me to be essentially one of legal institutions rather than of legal rules.¹³¹ There are, of course, some manipula-

127. From this point of view, for instance, it might be wise to look with suspiciously narrowed eyes upon suggestions that what the poor neighborhoods need are more big chain stores and less local enterprise. See, e.g., Sturdivant, *Better Deal For Ghetto Shoppers*, 6 HARV. BUS. REV. No. 2, at 130 (1968), *loathed on other grounds*, Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 19-20 (1969). The local furniture store keeper may be a predator, though there is doubt even as to that; he may be just a weaker hawk, who must kill many more mice to make a meal (with all the costs of such a diet), or even a vulture, who preys only on those the true hawks have already left for dead. See FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968). But even if he is, he is one who perforce must know and cultivate the local flora and fauna in order to survive. The "bad risk" is no great loss to the lordly lions of merchandizing; he is, however, the natural and only meat of the local jackal. Like most parasites, the shlock operators cannot afford to kill their hosts (see T. ROSEBURY, *LIFE ON MAN* 52 (paperback ed. 1970)), they tend to do their own collecting (see FEDERAL TRADE COMMISSION, *supra*), they are quite reputation sensitive, and *they are there*, to be dealt with, to be haggled with, and not only over sales, but over collections too. The channels of negotiation between them and their customers do already exist, and in the opinion of even some strong consumer spokesmen, while they may be used to cheat further, they can also be used for the benefit of the debtor. See DIXWELL LEGAL RIGHTS, *WAYS OUT OF MONEY TROUBLE* (ca. 1969), a pamphlet of advice to low-income debtors prepared by what is anything but a creditor front.

128. See Leff, *Contract As Thing*, 19 AM. U. L. REV. 131, 141 n.35 (1970).

129. See Rock, *supra* note 124.

130. If that appears horrifying, think of the social cost, think of the *economic* cost, of eliminating all crime or assuring that *no one* not entitled to it goes on relief. Cf. G. CALABRESI, *supra* note 97, at 17: "Our society is not committed to preserving life at any cost."

131. Any change in the applicable substantive law will change the likely settlement

tions of the substantive law which would conduce toward more efficient post-default bargaining,¹³² but in the main even those changes are of secondary importance. Of greater moment is so reshaping the institutional framework as to get for the merchant-consumer collection imbroglio some of the apparent advantages of the current merchant-merchant system.¹³³

One way to bring this about would have the government supply, in addition to the umpired killing ground of the current judicial-coercive system, an impartial source of particularized reality and a conversation pit.¹³⁴ There would be two key elements in this new mechanism. First, every effort would be made to assure that the parties be forced actually to confront each other to discuss their dispute before recourse to more

point on $L - L_1$, mostly by changing the potential end-point of any coercive collection play. For instance, if the systematic spite of repossession-and-resale or wage-garnishment were eliminated, t_d as we have defined it would also decrease, and many end-points would be less far south than they might have been. Similarly, an elimination of warranty disclaimers would raise the risk- t_c for many sellers, thereby moving them to more willing $L - L_1$ settlements. But all of these changes would eventually be compensated for in the market. They would go into price base just as a zoning change would go into the price base of a piece of property. That does not necessarily mean that such changes ought not be made. Even if they were in the gross eventually fully discounted by the market, they might still show up in it as impact modifiers. For instance, a change to strict liability for defective consumer goods might eventually lead to more of the buyers sharing the defect losses, rather than the unfortunates who get the exploding auto bearing all of it.

132. For instance, whatever other purposes might be served by abolishing the defense-proof status of the holder-in-due course of consumer paper, a move widely endorsed, even by those who are not given over to the simple-minded belief that anything that hinders creditors helps debtors (*compare* Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1 (1969), with Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 443, 464-73 (1968)), its abolition would also likely lead to more negotiations in which both sides are affected by all the relevant factors. The transfer of negotiable paper does create a differentiation between creating the debt and collecting it, so not only are the credibility and reputation factors dampened, but the range of compromise is restricted and atomized. The collector can only compromise by accepting less money, not by repairing or replacing the goods. The seller can do the latter, but is unable to do the former. And there is little point in talking to either about the things they cannot do.

133. See Vining, *On The Problem of Recognizing and Diagnosing Faultiness in the Observed Performance of an Economic System*, 5 J. LAW & ECON. 165, 167-68 (1962), on the tendency to overlook "new" systems in favor of modifications in existing ones. See also Griffiths, *Ideology in Criminal Procedure*, or *A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970). It is of course always dangerous and sometimes fatuous to suggest a partial deformation of a complex system made up of numerous elastic variables when one has no control over, and only the slightest prediction-justifying empirical data about, most of them. On "the theory of the second best," see G. CALABRESI, *supra* note 97, at 86-88, especially 86 n.21 which contains an extensive bibliography.

134. I am not sure why it must be the government. If trade fairs pay, why don't settlement fairs? It may only be that the legal framework of a capitalist economy, with its necessary public defense of private claims, already provides with its judicial-coercive model a collection system at public expense which *seems* so efficient that no private competitor can survive. That is, the State is already intervening to make a particular kind of "market." Or it may be because the most lucrative business, that involving intra-business disputes, already has its private mechanisms. On the other hand, my leap to the government may just be a spasmodic liberal gesture.

coercive collection practices could be had. I would interdict the two chutes, at least as a sole communication medium. Notices would be sent in such a form and manner as to have a fighting chance at reaching the addressee. Meetings would be so scheduled as to maximize the chance that the parties could, without undue inconvenience, actually attend. Naturally the parties could attend by agent, but only by ones authorized to act bindingly on their behalf.¹³⁵

Second, an impartial "referee" would be injected into the negotiations to assist the disputants. The referee's role would be to supply for this system much of the more trustable information that makes the merchant-merchant collection system feasible. One of his primary jobs, for instance, would be to make known to the parties what the legal situation is. He would in effect be charged with delivering to the debtor the collection-law equivalent of a *Miranda* warning, telling him he has no duty to settle, that if he doesn't have a lawyer he can get one, that he has certain possible defenses like breach of warranty and fraud (describing them briefly), and that the creditor cannot do anything to him prior to judgment. The referee, however, would also be charged with communicating to the debtor that if he does not have any valid defense, the creditor has at his disposal various legal devices which can have nasty consequences beyond the amount of the debt involved. And then, having communicated the applicable legal reality, the referee would attempt tactfully to act as midwife to the birth of a sensible plan of action for both parties.

Carrying out the referee's job with fairness and competence may be beyond the powers of mankind. The critical danger is that the referee would either fall into the trap of trying to settle everything, no matter how outrageous the creditor or debtor conduct, or decide that absolute "justice" demanded the exercise of all possible "rights" to the full.

135. The knowledge that this hearing would have to take place would encourage the parties to come up with the same results "out of court," that is, would encourage privately arranged conversational communication. Second, while only a large creditor could afford to have a full-time agent at the referee's chambers, smaller, more sporadic creditors could arrange to hire the services of professional "settlement agents" stationed full time at the scene of the action; in that way the sporadic litigant could get many of the economies of large-scale collections. In other words, the *business* of bargaining about collection problems would arise, with some hope of its becoming an efficient new communications industry. Such a function could also be carried out on behalf of consumers—whether in the instance Cs or Ds—by *in situ* public officers, either lawyers or "paralegals." Cf. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest Law*, 79 YALE L.J. 1005, 1019-23 (1970). In addition, it might turn out that the historically not uncommon broker-to-principal progression would take place here too, with the bargaining agents buying the claims at discount for their own accounts. If so, what might arise would be a secondary financing market for defaulted obligations, with the now-financers charging for the additional risk, but a better evaluated one.

These difficulties are not to be lightly dismissed. After all, this is hardly the first time that a mediation role has been suggested as an innovative grafting onto a conflict model, and the results in other contexts are, to say the least, ambiguous.¹³⁶

Moreover, it is almost in bad taste to describe the waste-making propensities of transaction costs in esurient detail and then suggest, as a possible cure, an additional layer of transactions. The only justification for such a bizarre course is the hope that its costs will be more modest than it might appear,¹³⁷ and in any event will be more than compensated for by the way it avoids other costs and losses. A compromise payment plan, if carried out, would transform the payment procedure back to the voluntary mode from the coercive mode.¹³⁸ Assuming that the payment plan were acceptable and feasible, the risk component of t_c would decrease dramatically. Moreover, to the extent that the systemic spite of the collection process were not at work destroying value, the likelihood of actual payment would be enhanced. One could also avoid both the bad will of intransigence and the costs of “contracting-out” collection, and the process would tend to decrease the parties’ value for spite. Most important, paying for accurate particularized information would lessen the chance of an unnecessary coercion game being played solely because of the parties’ ignorance of the realities of the situation. It is even possible that the gross costs of collection would decrease, that the costs and losses not only to the C-D “team” but even to Cs as a group, even to merchant Cs as a group, are greater under the current system than they would be if more precise information were “bought.”

Much more detailed shaping and planning of an actual system,¹³⁹ and perhaps even some operational testing, would be necessary before one could finally assess whether any real benefits inhere in this proposal, and if so, whether its cost can be economically justified. It is at least

136. See, e.g., C. STEVENS, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION* 122-146 (1963) and N. CHAMBERLAIN, *THE LABOR SECTOR* 624-25 (1965), on labor mediation; and J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 122-73 (1965), on mediation and conciliation in matrimonial disputes.

137. See note 135 *supra* for one cost-lowering mechanism.

138. Of course, the session with the Referee might lead to nothing. The parties might be irreconcilably at odds on the facts of the transaction. Either or both might be irrationally stubborn or spiteful. More likely, the debtor might be too sore beset by debts to be able to pay a reasonable enough amount to justify the creditor in foregoing his rush to dismember him before the other creditors got there. In such a case, the referee might counsel bankruptcy (either “straight” or Chapter 13) as the debtor’s best course.

139. Some such attempts to draft more precise plans are already underway. I am involved in some of them and I understand that a similar effort at the National Consumer Center at Boston College Law School is quite far advanced (though not in connection with or necessarily of a shape envisioned by this paper).

feasible that important cost-justified gains do exist. It may, of course, turn out that the nastiness and inefficiency of the current system is not remediable in this way. But they are certainly there, and it would be better if somehow they could be made to go away.